80-146

Supreme Court, U. S.
FILED
JUL 30 1980
MICHAEL RODAK, JR., CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979.

JOEL SHIFFRIN, ET AL.,

Petitioners,

vs.

EARL BRATTON, ET AL.,

Respondents.

FIRST NATIONAL BANK OF HIGHLAND PARK, A NATIONAL BANKING ASSOCIATION,

Petitioner,

vs.

ROGER CHAPMAN AND JEANNE CHAPMAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT COURT.

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QUESTION PRESENTED.

Where Congress has created a limited express private right of action for violations of one section of the Federal Aviation Act (49 U. S. C. 1487(a)), and has created an agency to enforce compliance with the Federal Aviation Act (49 U. S. C. § 1301 *et seq.*) ("Act"), and where legislative history is silent, can a private right of action for damages be implied against Petitioners' purported violations of 49 U. S. C. 1371(n)(2) and the special charter regulations promulgated thereunder by the agency.

Petitioners, First National Bank of Highland Park and Joel Shiffrin, pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit entered on March 10, 1980.

PARTIES INVOLVED.

The parties involved are identified in the caption of the case in this Court except in Shiffrin v. Bratton, the Co-Plaintiffs were Earl Bratton, Creative Tours and Travel, Inc., Gausepohl Travel Services, Inc. and Chicago Society of Association Executives. The Co-Defendants were Joel Shiffrin, First National Bank of Highland Park, Gerald Mann, Richard Tauber, Sunshine Travel of Nevada, Incorporated, Sunshine Travel Agency, Inc. and Tour Travel Enterprises, Inc.

INDEX

	PAGE
Question Presented	ii
Parties Involved	ii
Opinions Below	1
Jurisdiction	1
Statutes Involved	1
Statement for the Case	1
Reasons for Granting the Writ	4
Argument	6
I. The Majority in Its Second Opinion Disregarded the Decisions of This Court in *Touche Ross & Co.* v. *Redington* and *Transamerica* v. *Lewis*	6
II. The Majority Reaffirmed the Error Committed in Its First Decision	11
A. The Majority Declined to Follow This Court's Decision in Reaching Its Conclusion That *Cort's* Second Test Was Met	13
B. The Court Below in Its First Opinion Changed the Language of the Third *Cort* Test to Reach Its Decision	15
C. The Majority in Its First Opinion Incorrectly Applied the Fourth *Cort* Test	17
III. The Opinions of the Court Below Are in Direct Conflict with Opinions of Other Circuits and of the Same Circuit	18
Conclusion	19
Appendix	A1

Table of Authorities Cited.

Cases.

Cannon v. University of Chicago, 441 U. S. 677, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979) 6

City of Evansville, Ind. v. Kentucky Liquid Recycling, Inc., 604 F. 2d 2008 (7th Cir. 1979), cert. denied ..... U. S. ....., 100 S. Ct. 689 (1980) 5, 18

Cort v. Ash, 422 U. S. 66 (1975) 12, 13, 15, 16

National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U. S. 453 (1974) 4

Polansky v. TransWorld Airlines, Inc., 523 F. 2d 332 (3d Cir. 1975) 18

Rauch v. United Instruments, Inc., 548 F. 2d 452 (3d Cir. 1975) *rev'g on other grounds* 405 F. Supp. 435 (E. D. Pa. 1975) 18

Securities Investor Protection Corp. v. Barbour, 421 U. S. 412 (1975) 4

Touche Ross & Co. v. Redington, 442 U. S. 560, 99 S. Ct. 2479 (1979) 4, 6, 7, 9

Transamerica v. Lewis, ... U. S. ....., 62 L. Ed. 2d 146 (1976) 4, 10, 14, 15

Wolf v. Trans World Airlines, Inc., 544 F. 2d 134 (3d Cir. 1976) cert. denied 430 U. S. 915 (1977) 18

Statutes.

28 U. S. C. § 1331(a) 3

28 U. S. C. § 1337 3

49 U. S. C. § 1301 et seq. 3

49 U. S. C. § 1371(a) 1

49 U. S. C. § 1371(e)(6) 3
49 U. S. C. § 1371(n)(2) 1, 3
49 U. S. C. § 1487(a) 1

Federal Regulations.

Special Charter Regulations 14 C. F. R. § 378..... 1, 2
Rule 19(1)(b) of the Supreme Court of the United States 4

OPINIONS BELOW.

The decision and order of the District Court for the Northern District of Illinois, resulting in a dismissal of the action against First National Bank of Highland Park and Joel Shiffrin is reported at 440 F. Supp. 1275 (N. D. Ill. 1977), Appendix A, pp. A1-A16. The first opinion of the Court of Appeals reversing the District Court is reported at 585 F. 2d 223 (7th Cir. 1978), Appendix A, pp. A16-A34. On June 25, 1979, this Court at 443 U. S. 903 (1979) entered an order vacating the decision of the Court of Appeals and remanded the case for further consideration in light of *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 99 S. Ct. 2479 (1979). On March 10, 1980, the Court of Appeals compounded its prior error and again reversed the District Court. The second opinion is reported at ..... F. 2d ..... (7th Cir. 1980), Appendix B, pp. A37-A52.

JURISDICTION.

The second judgment of the Court of Appeals was entered on March 10, 1980. A timely petition for rehearing and suggestion of *en banc* rehearing was denied on June 12, 1980, by an *evenly* divided panel of the eight active judges. (Appendix C, pp. A53-A54). Jurisdiction is conferred in this court by 28 U. S. C. Section 1254(1).

STATUTES INVOLVED.

The pertinent sections of the Act are 49 U. S. C. 1371(a), 49 U. S. C. 1371(n)(2) and 49 U. S. C. 1487(a). They are set forth in Appendix D, pages A55-A56.

STATEMENT OF THE CASE.

Tour Travel Enterprises ("TTE") was a tour operator, as defined in 14 CFR § 378. A tour operator is any person who is authorized by the Civil Aeronautics Board ("CAB") pur-

suant to § 378 to engage in the formation of groups for transportation on inclusive tours (14 CFR § 378.2(6)(d) (Appendix E, p. A59)). An inclusive tour is defined as a round trip tour which combines air transportation, hotel accommodations and land services (14 CFR § 378.2(b) (Appendix E, pp. A57-A59)). They are sometimes referred to as OTC and ITC programs. Persons who are members of OTC or ITC groups are known as tour participants.

In order to qualify as a tour operator, one must, among other things, file with the CAB a depository agreement entered into and executed by a federally insured bank (14 CFR §§ 378.10, 378.13) (Appendix E, pp. A61-A63). In this particular case, TTE entered into a depository agreement with the Petitioner, First National Bank of Highland Park ("Bank").

The depository agreement executed by the Bank and approved by the CAB creates a contractual relationship between the Bank, Tour Operator and an air carrier (such as American Airlines). In accordance with the provisions of the depository agreement, the Bank agrees to establish a special account into which tour participants or the Tour Operator would make deposits of tour participants' funds (Section 1.1); to account for monies deposited by the Tour Operator and tour participants (Section 1.3, 1.4, 4.1); and to disburse monies in accordance with the provisions of said agreement.

On October 19, 1976, Tour Travel Enterprises, Inc. was adjudicated a bankrupt, and, by operation of Rules 401 and 601 of the Bankruptcy Act, the Bank believed that it was automatically restrained from taking any action against the bankrupt or the property of, or in the possession of, the bankrupt, thus prohibiting the Bank from refunding money pursuant to the terms of the depository agreement.

On or about November 19, 1976, Earl Bratton ("Bratton") filed the instant lawsuit purporting to represent himself as well as other tour participants, groups and persons.

On or about December 2, 1976, the CAB brought an action against the Tour Operator and Petitioners, alleging violations of various CAB regulations and requesting as relief, in part, full refunds for tour participants.

On or about January 26, 1977, Roger Chapman ("Chapman") et al. filed their complaint alleging therein essentially the same facts as contained in the Bratton complaint. The action brought by Bratton and Chapman allege, *inter alia,* the shortage of monies resulting from the Bank's purported violations of CAB regulations, aiding and abetting, conspiracy, fraud, breach of contract and breach of fiduciary relationship. As their sole basis for subject matter jurisdiction over the Petitioners, Bratton and Chapman relied upon 28 U. S. C. § 1331(a) (1970) and 28 U. S. C. § 1337 (1970) asserting that their claims arose under the Federal Aviation Act ("Act" or "FAA") of 1958, 49 U. S. C. §§ 1301-1542 (1970).

Neither Bratton nor Chapman alleged the specific section of the Federal Aviation Act upon which he relied as the basis for his action. Petitioners filed a motion to dismiss each action alleging, *inter alia,* that there was neither an express nor an implied private right of action arising from violations of regulations promulgated by the CAB. The District Court, after consolidating the cases for the purpose of deciding Petitioners' motion to dismiss, held that no private right of action existed and entered judgment in favor of Petitioners.

In the Court of Appeals, the cases were consolidated for argument, and Chapman and Bratton argued that the Federal Aviation Act granted an express private right of action and an implied right of action, citing, as their authority, Sections 1371(n)(2) and 1371(e)(6). The Court of Appeals, Bauer, J. dissenting, ruled, in its first decision (September 18, 1978) that although no express private right of action exists, a private right of action is implied under Section 1371(n)(2).

Petitioners filed their first Petition for a Writ of Certiorari on March 5, 1979, and on June 25, 1979, this Court entered

an order granting the Petition, vacated the judgment and remanded the case for further consideration in light of *Touche Ross* v. *Redington*, 442 U. S. 560, 99 S. Ct. 2479 (1979).

On March 10, 1980, the Court of Appeals, Bauer J. again dissenting, issued its second opinion, reaffirming its original decision.

REASONS FOR GRANTING THE WRIT.

This case is of importance in determining whether the Court of Appeals can disregard the clear language of *Touche Ross* in order to justify its prior decision and to usurp the power of Congress by creating, where none exists, a private cause of action for purported violations of federal statutes and regulations promulgated thereunder.

Basic to the issues here presented is whether the decisions of this Court in *Touche Ross* v. *Redington, supra,* and *Cort* v. *Ash,* 422 U. S. 66 (1975) are to be followed as controlling precedent or whether those decisions may be avoided by the tortuous application thereof, and whether courts can ignore the familiar maxim of *expressio unius est exclusio alterius,* which has consistently been applied by this Court in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers (Amtrak),* 414 U. S. 453 (1972), *Securities Investor Protection Corporation* v. *Barbour (SIPC),* 421 U. S. 412 (1975), and *Transamerica* v. *Lewis,* ..... U. S. ....., 62 L. Ed. 2d 146 (1979). The Court of Appeals, in failing to apply these decisions to this case, has twice decided a federal question in a way in conflict with the applicable decisions of this Court (Supreme Court Rule 19(1)(b)).

In addition, the two opinions of the Court of Appeals for the Seventh Circuit are in conflict with the cases decided by the Third Circuit of the Court of Appeals (Supreme Court Rule 19(1)(b)) which have heretofore determined that the legislative scheme of the Federal Aviation Act dictates against

the implication of a private right of action, and is in direct conflict with its own recent opinion in *City of Evansille, Ind.* v. *Kentucky Liquid Recycling, Inc.*, 604 F. 2d 2008 (7th Cir. 1979), cert. den. ..... U. S. ....., 100 S. Ct. 689 (1980).

Finally, the Court of Appeals, as to its second opinion, was *evenly* divided on the denial of the petition for rehearing *en banc*. Thus, the Court below is divisive as to whether correct consideration has been given upon remand of this Court to the instant case in the light of *Touche Ross* v. *Redington, supra.*

ARGUMENT.

I.

THE MAJORITY IN ITS SECOND OPINION DISREGARDED THE DECISIONS OF THIS COURT IN TOUCHE ROSS v. REDINGTON AND TRANSAMERICA v. LEWIS.

In *Touche Ross* v. *Redington, supra,* at 442 U. S. page 568, this Court stated:

> "The question of the existence of a statutory cause of action is, of course, one of statutory construction. SIPC's argument in favor of implication of a private right of action based on tort principles, therefore, is entirely misplaced. As we recently have emphasized, 'the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.' Instead, our task is limited solely to determining whether Congress intended to create the private right of action asserted by SIPC and the Trustee. And as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself." (Citations omitted.)

In the interpretation of a statute, this Court has made it clear in *Touche Ross* v. *Redington, supra,* that in those cases in which a private right of action has been implied in a statute not expressly providing one, that statute in question at least prohibited certain conduct or created federal rights in favor of private parties. Nowhere in the second majority opinion of the Court below, did that Court follow the aforesaid guidelines promulgated by the Court. This omission is made clear by Judge Bauer in his second dissent where he succinctly states that only in certain limited circumstances will a private right of action be implied in a statute not expressly providing one, i.e. where the statute in question at least prohibited certain conduct or *created federal rights* in favor of private parties, thus distinguishing the majority's reliance on *Cannon* v. *Univer-*

sity of Chicago, 441 U. S. 677, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979); and *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964). Judge Bauer, in his second dissent correctly points out that this statute neither prohibits certain conduct nor creates federal rights in favor of private parties, stating that it does not follow from a plain reading of Section 401(n)(2) that the Congress evinced an intent to create a private remedy for damages, and that the relief sought by Section 401(n)(2) would be actionable in state court on a breach of contract claim, rather than a federal statutory cause of action impliedly cognizable under said Section. (Appendix B, p. A48.)

The majority recognized that a review of legislative history was another criterion in determining whether or not Congress intended to create a private cause of action; however, the majority departed from the realm of reality and from the specific mandate of *Touche Ross* v. *Redington, supra,* when it stated:

> "Although the legislative history is scarce, there is nothing in the statute that explicitly creates or denies a private remedy. *From the congressional silence, however, we have read a positive implication in favor of a private cause of action.*" (Emphasis supplied.) (Appendix B, p. A41.)

In *Touche Ross* v. *Redington, supra,* at page 571, this Court held that implying a private cause of action on the basis of congressional silence is a hazardous enterprise at best. Judge Bauer, in his second dissent, states:

> "The majority concedes that 'the legislative history is scarce,' *ante* at 5, but reasons that because the statute neither explicitly creates nor denies a private remedy, it is free to infer one. Accordingly, the majority concludes that '[f]rom the congressional silence, however, we have read a positive implication in favor of a private cause of action.' Id. It seems to me that this conclusion ought to have been reached by circumspection rather than conjecture." (Appendix B, pp. A46-A47)

> "The paucity of legislative history on this question compels the conclusion that no private remedy should be implied in this case either, and it is simply a *non sequitur* to 'read' a contrary conclusion from this deafening legislative silence." (Appendix B, p. A47.)

As additional justification in an attempt to support its second erroneous decision, the majority states:

> "Second, even if there was no indication at all of congressional intent to create a private remedy that factor is not conclusive when the remedy is needed to effectuate a stated fundamental congressiona purpose in enacting the amendatory provision." (Appendix B, pp. A41-A42.)

There is nothing in the second majority opinion or in the record which supports the conclusion of the majority that the remedy is needed to effectuate a stated congressional purpose. This portion of the majority opinion, much like its clairvoyant vision of congressional intent, clearly indicates the majority's determined effort to legislate a cause of action where none exists.

As a final purported justification for its second decision, the majority states:

> "Finally, this court's conclusion that the presence of an express private remedy in section 1007 did not indicate a congressional intent to exclude other private remedies is supported by the Supreme Court's reasoning in both *Cannon* and *Touche Ross*. The reasoning of these two cases plainly indicates that more is required to infer that Congress did not intend to create a particular private right than one fact that elsewhere in the same statute congress has explicitly granted a private cause of action. For example, in *Touche Ross* the Supreme Court concluded that the record keeping provision under review was not intended to create private rights when other provisions which flanked that provision contained expressly-created remedies, and when one of those provisions specifically concerned false statements in reports and was enacted contemporaneously with the record keeping provision. 99 S. Ct. at 2487-2488. With respect to the case under review, sections 1007 and 401(n)(2) were not created contemporaneously nor did

Congress refer to section 1007 when delimiting the scope of the right created in section 401(n)(2). In sum, considerations which the Supreme Court in *Touche Ross* treated as relevant in concluding that Congress did not intend to infer a private right of action do not exist in the present case." (Appendix B, pp. A42-A43.)

Judge Bauer, in his dissent, answers:

"The majority attempts to distinguish the applicability of *Touche Ross* to this case on the basis that the Supreme Court found further justification for not implying a private right of action under § 17(a) of the Securities Exchange Act of 1934 because other sections flanking § 17(a) provided private rights of action. *Ante* at 6-7. But the Congress also provided explicit remedies for violations of the FAA which, in my view, compel the conclusion that these explicit remedies are the exclusive means of enforcement for a violation of the duties and obligations imposed by the Act (footnote omitted). See, e.g., 49 U. S. C. §§ 1471, 1472, 1482, 1487. The mere fact that the Congress did not enact the remedial provisions of the FAA contemporaneously with Section 401(n)(2) nor refer to these remedial provisions when delimiting the scope of the right created in that section does not extinguish the vitality of *Touche Ross* in the context of this appeal. As stated in *Touche Ross*:

> " 'Further justification for our decision not to imply the private remedy that SIPC and the Trustee seek to establish may be found in the statutory scheme of which § 17(a) is a part. First, § 17(a) is flanked by provisions of the 1934 Act that explicitly grant private causes of action. § 16(b), 15 U. S. C. § 78p(b); § 18(a), 15 U. S. C. § 78r(a). Section 9(e) of the 1934 Act also expressly provides a private right of action. 15 U. S. C. § 78i(e). See also § 20, 15 U. S. C. § 78t. Obviously, then, when Congress wished to provide a private remedy, it knew how to do so and did so expressly.' " (Citations omitted.) (Emphasis supplied.)

"Similarly, in this case the Congress provided express remedies for a violation of the Act. See *e.g.*, 49 U. S. C.

> §§ 1471, 1472, 1482, 1487. If the Congress wished to provide a private remedy for damages under Section 401(n)(2), it is well aware of how it may effectuate that intent." (Appendix B pp. A48-A50.)

In *Transamerica* v. *Lewis*, ... U. S. ....., 62 L. Ed. 2d 146 (1979), this Court, at pages 154-155, stated that it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it and when a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.

There, this Court reviewed the judicial and administrative means of enforcing compliance with Section 206 of the Investment Advisors Act of 1940 (15 U. S. C. §§ 80b-1, *et seq.*) and determined that in view of the express provision for enforcement by the SEC of the duties imposed by Section 206 it was highly improbable that Congress absent-mindedly forgot to mention an intended private action. Paraphrasing the language of *Transamerica* and substituting the section numbers of applicable enforcement provisions of the Federal Aviation Act, the opinion in *Transamerica* would read as follows:

> "Congress expressly provided both judicial and administrative means for enforcing compliance with '§ 1371.' First, under '§ 1482' willful violations of the Act are criminal offenses, punishable by fine or imprisonment, or both. Second, '§ 1487' authorizes the Commission to bring civil actions in federal courts to enjoin compliance with the Act, including, of course, '§ 1371(n)(2).' Third, the Commission is authorized by '§ 1487' to impose various administrative sanctions on persons who violate the Act, including '§ 1371(n)(2).' In view of these express provisions for enforcing the duties imposed by '§ 1371(n)(2)' it is highiy improbable that 'Congress absentmindedly forgot to mention an intended private action.' "

In summary, the majority disregarded this Court's rulings in an effort to "improve" upon the statutory scheme which

Congress enacted into law. As Judge Bauer, in his second dissent, concludes:

> "In this case, the statute by its terms grants no private rights in favor of any party, proscribes no conduct as unlawful, and the legislative history is similarly silent on the issue of the availability of private remedies under Section 401(n)(2) of the FAA. In my view, for these same reasons found dispositive in *Touche Ross*, our inquiry should also end there, and '[i]f there is to be a federal damage remedy under these circumstances, Congress must provide it.'" 99 S. Ct., at 2490. (Appendix B p. A52.)

From the foregoing, the following controlling and salient principles are thus distilled from the pronouncements of this Court:

(a) When Congress wished to provide a private damage remedy, it knew how to do so and did so expressly;

(b) It is highly improbable in the absence of a statutory private remedy, that Congress absent-mindedly forgot to mention an intended private action; and

(c) The absence of an express statutory private action strongly suggests that Congress was simply unwilling to impose any potential monetary liability in favor of a private suitor.

Accordingly, it is respectfully submitted that no private remedy should be implied with respect to the instant statute.

II.

THE MAJORITY REAFFIRMED THE ERROR COMMITTED IN ITS FIRST DECISION.

In its second opinion, the Court below observed that this Court in *Touche Ross* v. *Redington, supra,* reaffirmed that the four indicia identified in *Court* v. *Ash, supra,* are useful guides in determining whether or not a private right of action exists. However, the Court of Appeals, in addition to misconstruing *Touche Ross* v. *Redington, supra,* reaffirmed its prior decision,

thereby committing again the same errors contained in its first decision.

As a result, Petitioners are required to analyze both opinions of the Court below, pointing out where the first opinion is inconsistent with *Cort* v. *Ash* and *Touche Ross* v. *Redington*, and that the second opinion continues such error.

In *Cort* v. *Ash, supra*, at page 78, this Court set forth the four relevant criteria in determining whether a private remedy is implicit in a statute not expressly providing one. They are:

1. Is the plaintiff one of the class for whose especial benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff?

2. Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?

3. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

4. Is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

The majority of the Court of Appeals in its first decision held that plaintiffs had satisfied all tests. Judge Bauer, in his first dissent, held that plaintiff had failed to meet the second, third, and fourth tests. It is patently clear that the majority distorted the *Cort* tests in order to reach its conclusion.

In discussing the *Cort* tests, it is necessary that we refer to the first opinion of the Court below since it was there they were considered, albeit erroneously, which error without discussion was carried over to the second opinion.

A. The Majority Declined to Follow This Court's Decisions in Reaching its Conclusion That Cort's Second Test Was Met.

In considering the application of the second factor in *Cort*, the Court below, in its first opinion, acknowledged that neither Section 1371(n)(2) of the Act, nor its legislative history revealed Congressional intent. The Court then continued.

> "On this basis, appellees argued below, and the district court agreed, that since section 1487(a) of the FAA explicitly provides for agency (CAB) enforcement of all provisions of the FAA, and since it also provides for limited private enforcement of one provision of the Act (i.e., enforcement § 1371(a) by 'parties in interest'), an inference arises that those expressly created remedies exclude all others, especially since no clear evidence of legislative intent can be shown. This line of reasoning reflects the familiar doctrine of *expressio unius est exclusio alterius*, which has recently been applied by the Supreme Court in National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak) 414 U.S. 453 (1974), and SIPC v. Barbour, 421 U.S. 412 (1975). *Though the argument has some force in relation to this case, we do not believe it determinative.*" (Emphasis supplied.) (Appendix A, pp. A25-A26.)

The majority, in its first opinion, then held that the "application of *expressio unius* in this context would serve only to frustrate the goal of assuring adequate security for travelers' compensation" and that the implication of a private remedy would be consistent with the underlying purposes of the statute in dispute. (Appendix A, p. A26.)

The first minority opinion answers the majority's efforts to brush aside the *expressio unius* doctrine. Judge Bauer stated:

> "Similarly, in the case at hand, Congress has provided a private remedy for violation of section 1371(a) of the FAA, but has not done so for section 1371(n). It seems quite apparent, therefore, that, in this case, too, the principle of *expressio unius* compels the conclusion that the

> remedies created in [§ 1371(n)] are the exclusive means to enforce the duties and obligations imposed by the Act.'" (Appendix A, p. A32.)

In his dissent, Judge Bauer also stated:

> "Such an approach, however, misconceives the essential nature of the inquiry in deciding whether or not the *expressio unius* doctrine applies; for, as the Supreme Court has made clear,
>
> > '[an] express statutory provision for one form of proceeding ordinarily implies that no other means of enforcement was intended by the legislature. That implication would yield, however, to *"clear contrary evidence of legislative intent,"* for which we [turn] to the legislative history and the overall structure of the . . . Act.' (Emphasis by the court.)
>
> "Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 419 (1974) (emphasis supplied) (citations omitted). Thus, in determining the applicability of the *expressio unius* doctrine, the central question is not whether a private right of action is 'consistent' with the purposes or goals of the statute, but rather, whether the overall structure of the Act, or its legislative history, furnish *'clear evidence'* of a Congressional intent to create a private remedy. This distinction is crucial, for, as the majority itself apparently concludes, 'there is no indication' of such an intent in either the legislative history or the structure of the FAA. It follows from the majority's own conclusion, therefore, that *expressio unius* should apply and that the second of the four Cort tests is not met in this case." (Emphasis supplied.) (Appendix A, pp. A32-A33.)

The opinion of the Court below, when reviewed in light of the minority opinion and the opinion rendered in *Transamerica* v. *Lewis, supra, Touche Ross* v. *Redington, supra,* and *City of Evansville* v. *Kentucky, supra,* results in an inconsistent application of law.

In *Transamerica, supra,* at 62 L. Ed. 2d 154-155, this Court stated:

> ". . . Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' " (Citations omitted.)

And at pages 155-156, this Court stated:

> "Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." (Citations omitted.) "The fact that it enacted no analogous provisions in the legislation here at issue strongly suggests that Congress was simply unwilling to impose any potential monetary liability to a private suitor." (sic)

In the instant case, the Court below, without explanation, indicated that the underlying principles of *Amtrak* and *SIPC* are only of "some force" and not determinative here (Appendix A, p. A26). It is respectfully submitted that the issues in those cases, as well as *Touche Ross,* are identical to those in the case at bar and the *expressio unius* doctrine should have been consistently applied.

B. The Court Below in Its First Opinion Changed the Language of the Third Cort Test to Reach Its Decision.

The Court below, in considering the third *Cort* test, stated:

> ". . . the extent of the agency's enforcement powers must be carefully considered before deciding whether expressio unius is to apply, and whether the implication of a private remedy would be 'consistent' with the underlying purposes of the *statute in dispute,* which is the third Cort factor to be considered." . . . (Emphasis supplied.) (Appendix A, pp. A26-A27.)

The third *Cort* test is *not* whether the implication of a private remedy would be consistent with the purposes of the statute in dispute, but, rather, whether the overall structure and legislative scheme of the entire FAA furnishes clear evidence of a

Congressional intent to create a private remedy. *Cort* v. *Ash, supra,* at 422 U. S. at page 78. It is respectfully submitted that the first majority opinion's conclusion, as reaffirmed by the second opinion, no longer requires a court to determine the legislative scheme and overall structure of an Act as required by *Cort*. The opinion allows a court merely to determine from a small phrase in a statute that a private right of action may be implied. Following the reasoning set forth in the majority opinion, an implied cause of action will exist for every violation of a federal statute and regulation, since every statute and each regulation promulgated by the various agencies of the United States serve to protect the public.

Paraphrasing the language of *Cort,* it can be here said:

> "Every [regulation] is designed to protect some individual, public, or social interest * * *. To find an implied civil cause of action for the plaintiff in this case is to find an implied civil right of action for every individual, social, or public interest which might be invaded by violation of any [regulation]." * * * 422 U. S. at page 79.

Judge Bauer's first dissent answers the majority's conclusion that the third *Cort* test was met:

> "Moreover, I cannot agree that a private right of action is even 'consistent' with the structure and goals of the FAA. On this point, the majority appears to suggest that private remedial measures are necessary to further the Congressional purpose of protecting travelers from 'losses due to violations of the Charter Regulations.' But even if a major purpose of the Act is to protect travelers from such losses (and even if the majority is correct in claiming that the CAB *may* not be able to sue for a refund of tour deposits), it does not follow that a private remedy is consistent with the statutory scheme." (Emphasis by the Court.) (Appendix A, p. A33.)

C. The Majority in Its First Opinion Incorrectly Applied the Fourth Cort Test.

The majority stated that the issue is the Petitioners' alleged willful violation of fiduciary obligations specifically imposed by voluntary agreement to adhere to federal regulations; that it is necessary to construe the federal regulations to determine the nature of the fiduciary obligations; and that there is a need for uniformity in construing federal regulations.

It is urged that the opinion of the Court below fails to make any determination regarding whether or not the allegations contained in the Bratton and Chapman complaints are matters traditionally relegated to state law. Instead, the Court below decided the fourth *Cort* test solely upon the purported need for uniformity in the application of federal regulations.

Judge Bauer speaks to the failure to satisfy the fourth requirement of *Cort* as follows:

> "Finally, it seems to me that this cause of action is a matter 'traditionally relegated to state law,' and thus fails to satisfy the fourth requirement of Cort. The majority reaches the opposite conclusion on the grounds, apparently, that there is a need for 'uniformity' in construing federal regulations. What the opinion fails to make clear, however, is precisely what an adjudication of the plaintiffs' common law claims of fraud, breach of contract, conversion, and breach of fiduciary duty, would 'necessarily have to refer to the federal regulations subsumed in the agreements between the principals.' To say that federal regulations required the bank to assume certain legal obligations to the tour operator (and hence the tour participants) is one thing. To say that the regulations defined those obligations is quite another. And for my part, I can see no reason why a determination of the plaintiffs' non-federal claims would require anything other than the application of familiar principals of common law contracts and torts. I must conclude, therefore, that the fourth element of the Cort test, like the second and third, furnishes no support for the plaintiffs' position." (Appendix A. pp. A33-A34.)

The Court below effectively eliminated the fourth *Cort* test when it reached the conclusion that such test is satisfied by the need for uniformity in construing federal regulations. It is respectfully submitted that there is always a need for uniform interpretation of law, but the application of such need to the fourth *Cort* test begs the question and renders meaningless such test.

III.

THE OPINIONS OF THE COURT BELOW ARE IN DIRECT CONFLICT WITH OPINIONS OF OTHER CIRCUITS AND OF THE SAME CIRCUIT.

The two opinions of the Court below also are in direct conflict with the cases decided by the Court of Appeals for the Third Circuit which has heretofore determined that the legislative scheme of the Act dictates against the implication of a private right of action. *Rauch* v. *United Instruments, Inc.*, 548 F. 2d 452 (3rd Cir. 1976), *Polansky* v. *Transworld Airlines, Inc.*, 523 F. 2d 332 (3rd Cir. 1975), *Wolf* v. *Trans World Airlines Inc.*, 544 F. 2d 134 (3rd Cir. 1976), *cert. denied*, 430 U. S. 915 (1977). Although each case arose out of a purported violation of different sections of the Federal Aviation Act, the Court of Appeals for the Third Circuit, in each case, held that the statutory scheme of the Act does not contemplate a private right of action for violations which result in economic loss to the aggrieved party.

Additionally, the opinions of the Court below are in direct conflict with its recent opinion rendered in *City of Evansville* v. *Kentucky Liquid Recycling, Inc., supra.*

The cases cited herein demonstrate the Court of Appeals' errors. If the decisions are upheld, it is foreseeable that the federal court system could be inundated with claims arising out of miscellaneous minor passenger inconveniences, which the legislature clearly never intended.

CONCLUSION.

In summary, the opinions of the Court below avoided the clear and controlling holdings of this Court in *Touche Ross* v. *Redington, Transamerica* v. *Lewis, Amtrak, SIPC* and *Cort* v. *Ash, supra,* to reach its conclusions. By doing so, it has erroneously created an unnecessary federal cause of action which will potentially burden the federal court dockets with hundreds of small claims and has opened the door for causes of action to be judicially created for violations of federal regulations. As Judge Bauer has stated in his first dissent, ". . . the opening of new vistas in private causes of action ought to be approached rather fearfully and with more tender regard for the acts of Congress and the limitation of the federal bench" (Appendix A. p. A31), so that "[r]egulatory agencies, and the rules they function under should not, . . . be the launching pads for new judicial journeys that add more ballast to an overburdened federal system of dispensing justice." (Appendix A. p. A34.)

For the reasons stated above, this Honorable Court should grant this second petition for certiorari brought herein, reverse the decision of the Court of Appeals, and affirm the District Court.

Respectfully submitted,

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APPENDIX

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

EARL BRATTON, ET AL., *Plaintiffs,* *vs.* JOEL SHIFFRIN, ET AL., *Defendants.*	No. 76 C 4282
HEMISPHERE TRAVEL, INC., ET AL., *Plaintiffs,* *vs.* FIRST NATIONAL BANK OF HIGHLAND PARK, ET AL., *Defendants.*	No. 76 C 4707
ROGER CHAPMAN, ET AL., *Plaintiffs,* *vs.* FIRST NATIONAL BANK OF HIGHLAND PARK, *Defendant.*	No. 77 C 284[1]

1. Thus far four separate lawsuits have been filed as a result of these incidents. The three actions brought by private plaintiffs are consolidated here for the purpose of ruling on the motions to dismiss by the defendants First National Bank and Joel Shiffrin. Fed. R. Civ. P. 42(a).

(Footnote continued on next page.)

MEMORANDUM OPINION.

Plaintiffs are individual travelers and retail travel agencies who made deposits to reserve places on numerous charter tours to such places as Mexico, Hawaii, and Las Vegas. The tours were organized and sold by the defendant travel companies. Defendants include Tour Travel Enterprises, the wholesale tour operator which organized the trips; Sunshine Travel Agency and Sunshine Travel of Nevada, two retail travel agencies dealing in tours organized by Tour Travel; Gerald Mann and Richard Tauber, owners and officers of the three travel companies; and the First National Bank of Highland Park and its vice president, Joel Shiffrin. The Bank and Shiffrin held accounts for the other defendants, including special escrow accounts required by regulation for charter tour deposits.

The tours were scheduled to depart after October 15, 1976. On that date or shortly thereafter, involuntary bankruptcy proceedings were initiated against Tour Travel Enterprises, Sunshine Travel and Sunshine Travel of Nevada.[2] The scheduled tours never occurred and the deposits made by the plaintiff tour participants have not been refunded. Some of these deposits

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(Footnote continued from preceding page.)

The fourth action was commenced by the Civil Aeronautics Board pursuant to its general enforcement powers under the Federal Aviation Act. For a full understanding of this opinion, reference should be made to the C. A. B. case as well. *C. A. B.* v. *Tour Travel Enterprises, Inc.*, ... F. Supp. ....., No. 76 C 4693 (N. D. Ill. 1977).

2. Tour Travel Enterprises and Sunshine Travel Agency were adjudicated bankrupt on October 19, 1976. Sunshine Travel of Nevada and other affiliates followed on October 26, 1976. In re Tour Travel Enterprises, Inc., No. 76 B 8014 (N. D. Ill. 1976); In re Sunshine Travel Agency, Inc., No. 76 B 8015 (N. D. Ill. 1976); In re Sunshine Travel of Nevada, Inc., No. 76 B 8075 (N. D. Ill. 1976). All related cases were consolidated on December 23, 1976, into No. 76 B 8014.

were made to the travel companies, others were deposited directly with the Bank.

Plaintiffs have requested that the Bank refund their monies. Apparently the funds on deposit in the special escrow accounts are insufficient to reimburse all disappointed tour participants. The Bank filed an interpleader action in bankruptcy court concerning the deposits it holds. On March 17, 1977, the bankruptcy judge dismissed the interpleader, ruling the court lacked summary jurisdiction over the escrow funds. *In re Tour Travel Enterprises, Inc.*, No. 76 B 8014 (N. D. Ill. March 17, 1977).

Plaintiffs allege that defendants violated certain C. A. B. regulations governing these charter tour deposits. In particular they claim that defendants First National Bank of Highland Park and Joel Shiffrin violated the regulations dealing with special escrow accounts for tour deposits. Under 14 C. F. R. §§ 378.16 and 378a.31 (1977), all deposits made by tour participants to operators or retail travel agents must be deposited in a special escrow account with a federally insured bank or savings and loan association. The bank is to maintain a separate accounting for each tour. The depository bank, the tour operators and the participating air carriers are to enter into a depository agreement governing the deposits.[3] Under the regulations, disbursements may be made from the accounts only under certain circumstances. The bank may pay the direct air carrier, hotels, sightseeing and other surface accommodations up to a fixed per cent of the total deposits received by the bank. If a tour is cancelled, the bank is to make refunds directly to the tour participants. Regulations 14 C. F. R. §§ 378.18 and 378a.32 (1977) forbid the bank or the tour operator from making disbursements from tour-participant deposits except in accordance with these regulations. In addition, the tour operator

3. Tour Travel Enterprises and First National Bank of Highland Park were party to such an agreement. *See* Exhibit A of the First Amended Complaint in *Bratton* v. *Shiffrin*, No. 76 C 4282 (N. D. Ill., filed January 3, 1977).

must furnish a surety bond or other security arrangement to insure the financial responsibility of the tour operator and the performance of tour services in accordance with the contract between the operator and the tour participants. In this case, in lieu of a bond, Tour Travel entered into a surety trust agreement with the First National Bank inuring to the benefit of the tour participants.[4] Plaintiffs further allege that the Bank breached its duties and obligations under the escrow and surety trust agreements.

Defendants First National Bank and Joel Shiffrin have moved to dismiss the complaints for lack of subject matter jurisdiction, failure to state a claim, and failure to join an indispensable party (the trustee in bankruptcy).[5] We grant the motions to dismiss for failure to state a claim.

Jurisdictional Allegations

Defendants First National Bank and Shiffrin challenge plaintiffs' claim of jurisdiction based on the Federal Aviation Act of 1958, 49 U. S. C. §§ 1301 *et seq.* (1970), and 28 U. S. C. §§ 1331(a) and 1337 (1970). 28 U. S. C. § 1337 (1970) gives this court jurisdiction over cases arising under statutes enacted pursuant to Congress' authority to regulate interstate commerce, regardless of the amount in controversy. Clearly the Federal Aviation Act of 1958 is an act regulating commerce. *Rauch* v. *United Instruments, Inc.*, 548 F. 2d 452, 455 (3d Cir. 1976). Because plaintiffs assert that the provisions of the Federal Aviation Act and the regulations promulgated thereunder provide for a private right of action on their behalf, we have jurisdiction under Section 1337 to determine whether a

4. *See* Exhibit B of the First Amended Complaint in *Bratton* v. *Shiffrin*, No. 76 C 4282 (N. D. Ill., filed January 3, 1977).

5. Defendants also claim these actions must be stayed under Rules 401 and 601, Fed. R. Bank. P. 401, 601.

federal claim has been stated.[6] *Bell* v. *Hood,* 327 U. S. 678 (1946); *Enders* v. *American Patent Search Co.,* 535 F. 2d 1085, 1087-88 (9th Cir. 1976), *cert. denied,* ..... U. S. ..... (1977).

Explicit Provisions of 49 U. S. C. § 1487(a)

There are two possible routes to establishing a private remedy under the Federal Aviation Act; the first is by reliance on the explicit provisions of the Act, the second is by implying a private right of action from those provisions. Section 1487 of the Act gives the Civil Aeronautics Board the authority to enforce the statute, rules and regulations. Further, under that provision "any party in interest" may seek injunctive relief in the district court for a violation of Section 1371(a). 49 U. S. C. § 1487(a) (1970). Thus, if a violation of Section 1371(a) were involved, plaintiffs could rely on the explicit grant of Section 1487(a). *See generally* Annot., 19 A. L. R. Fed. 951 (1974).

There are several reasons why this provision does not apply to the Bank or its officer. Initially, one need only read the language of Section 1371(a):

> No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

The definition of "air carrier" includes anyone who directly or indirectly engages in air transportation. 49 U. S. C. § 1301(3). The concept of an indirect air carrier is broad enough to include a tour operator who arranges charter flights. *C. A. B.* v. *Carefree Travel, Inc.,* 513 F. 2d 375, 387 (2d Cir. 1975). However, we

6. Where a complaint claims invasion of a federal right, the court has jurisdiction to determine whether a claim has been stated. Thus a dismissal should be made on the merits under Rule 12(b)(6) for failure to state a claim, and not for want of subject matter jurisdiction. 1 J. MOORE, FEDERAL PRACTICE ¶ 0.62[2.-2], at 664 (2d ed. 1977).

do not feel justified in extending the definition to encompass the Bank. While it is possible the Bank is an agent of an air carrier (at least for some purposes),[7] this finding alone would not make the agent liable for possible statutory violations by the principal.[8] Plaintiffs' allegations do not support a claim of a breach of Section 1371(a) by the Bank or Shiffrin.

Secondly, the loss of the tour deposits was not caused by the failure of anyone to be certified as an air carrier, so Section 1371(a) is simply not involved in this case.

Finally, Section 1487(a) is a provision for injunctive relief. Any additional relief must be ancillary to the equitable remedy provided for in the statute. The private plaintiffs have not specifically requested injunctive relief; their prayer for relief seeks money damages.[9] Accordingly, the provisions of Section 1487(a) do not provide them with an explicit statutory remedy of a private nature.

Implied Private Right of Action

The next course of inquiry is to determine whether plaintiffs have an implied private right of action under the statute and the regulations. Plaintiffs allege violations of certain C. A. B. regulations governing charter tour deposits. 14 C. F. R. §§ 378.16, 378.18, 378a.31, 378a.32 (1977). In order to decide whether a private right of action exists under these regulations, we must examine the statutory provisions under which they were promulgated. An administrative agency cannot create a federal private right of action by enacting regulations; the right must be implied from the underlying statutory authority.

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7. The Bank as escrowee may be a "special" agent for both parties, with the terms of the agency relationship defined by the escrow agreement.

8. We do not mean to imply a finding of violation of § 1371(a) by any of the travel companies at this time.

9. The plaintiffs in *Bratton* v. *Shiffrin* requested "such other and further relief as may be just and equitable."

Plaintiffs have provided us little assistance, citing the entire Federal Aviation Act of 1958 as their jurisdictional base.[10] After reviewing the statutory authority cited in 12 C. F. R. Part 378 (1977),[11] we have concluded that the regulations establishing security arrangements for charter tour deposits were promulgated pursuant to the authority of 49 U. S. C. § 1371(n)(2) (1970). That provision reads:

> In order to protect travelers and shippers by aircraft operated by supplemental air carriers, the Board may require any supplemental air carrier to file a performance bond or equivalent security arrangement, in such amount and upon such terms as the Board shall prescribe, to be conditioned upon such supplemental air carrier's making appropriate compensation to such travelers and shippers, as prescribed by the Board, for failure on the part of such carrier to perform air transportation services in accordance with agreements therefor.

A supplemental air carrier is defined as a carrier engaged in providing charter trips. 49 U. S. C. § 1301 (35) and (36). Tour operators, such as Tour Travel Enterprises, who arrange charter tours are properly within the mandate of this statutory provision. Section 1324(a) grants the Board the general power to make such regulations as it deems necessary to carry out the provisions of the Federal Aviation Act. 49 U. S. C. § 1324(a) (1970). In light of this broad statutory authority, we find that Regulations 378.16, 378.18, 378a.31, 378a.32 are valid promulgations

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10. The only specific allegation is that of a violation of 49 U. S. C. § 1485(e), which reads:

> It shall be the duty of every person subject to this chapter, and its agents and employees, to observe and comply with any order, rule, regulation, or certificate issued by the Administrator or the Board under this chapter affecting such person so long as the same shall remain in effect.

11. 14 C. F. R. Part 378 states that the provisions of that part are issued under the authority of 49 U. S. C. §§ 1301, 1324, 1371, 1372, 1379 and 1384.

implementing 49 U. S. C. § 1371(n)(2) (1970). It appears this is a case of first impression on implying a private right of action under this provision, although the question has arisen regarding other sections of the Act.[12]

In determining whether a private right of action should lie under the statutory provision and regulations, we are aware of the directive that it is "the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964). However, a private remedy is not to be implied for every statutory violation. We must test this action according to the guidelines established by the Supreme Court in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975), for the judicial implication of private remedies. The Court set out four relevant factors to be weighed in determining whether a private remedy is implicit in a statute not expressly providing one. 'First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted' . . .? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for for plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U. S. at 78 (citations omitted).

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12. *See, e.g., Rauch* v. *United Instruments, Inc.*, 548 F. 2d 452 (3d Cir. 1976) (Section 1421); *Wolf* v. *Trans World Airlines*, 544 F. 2d 134 (3d Cir. 1976) (Sections 1381, 1373(b)), *cert. denied*, ... U. S. ..... (1977); *Polansky* v. *Trans World Airlines*, 523 F. 2d 332 (3d Cir. 1975) (Sections 1374(b) and 1381); *Nader* v. *Allegheny Airlines, Inc.*, 512 F. 2d 527 (D. C. Cir. 1975) (Section 1374(b)), *rev'd on other grounds*, 426 U. S. 290 (1976); *Fitzgerald* v. *Pan American Airway*, 229 F. 2d 499 (2d Cir. 1956) (Section 1374(b)); and *Gabel* v. *Hughes Air Corp.*, 350 F. Supp. 612 (C. D. Cal. 1972).

Applying these factors to the case at bar, we find that the individual plaintiff tour participants are within the class for whose benefit the statute was passed and the regulations promulgated. The explicit language of 49 U. S. C. § 1371(n)(2) (1970) reads "[i]n order to protect travelers," the Board may require supplemental air carriers to file a security arrangement to insure compensation to travelers for failure to perform agreed upon services. The individual plaintiffs became tour participants once their deposits were made; they are clearly within the class for whose "especial" benefit this statutory provisions was enacted.[13] The legislative history of the regulations further verifies the individual plaintiffs' status as members of the protected class. The regulations were proposed "to insure the financial responsibility of the tour operator to the traveling public." Notice of Proposed Rule Making, 30 Fed. Reg. 281, 282 (1965) (explanatory statement issued by the C. A. B.)[14] However, it is equally clear that the plaintiff travel agencies are not within the class for whose "especial" benefit the statute and regulations were enacted. Travel agencies are not members of the traveling public. Thus, the plaintiff agencies fail to meet the threshold requirement for implying a private right of action.

The mere fact the individual tour participants fall within the protected class is insufficient in itself to warrant implying a private right of action on their behalf. "[T]he inference of such a private cause of action not othewise authorized by the statute must be consistent with the evident legislative intent and, of

13. *See* H. R. Rep. No. 1950, 87th Cong., 2d Sess. (1962), *reprinted in* 1962 U. S. Code Cong. and Admin. News 1844, 1866-67.

14. *See also* Inclusive Tours by Supplemental Air Carriers, Certain Foreign Air Carriers, and Tour Operators: Modification of Surety Bond Requirements for Tour Operators, 36 Fed. Reg. 6586 (1971) (Preamble to regulations amending the surety bond requirements "to provide better protection to the public from defalcations by tour operators or breach of the contract between the tour operator and the tour participant.")

course, with the effectuation of the purposes intended to be served by the Act." *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U. S. 453, 458 (1974) ("Amtrak"). Plaintiffs' claim must be tested against the additional criteria established in *Cort* v. *Ash, supra.*[15]

The next inquiry is whether there is any indication of legislative intent either to create or deny a private remedy. The legislative history of the Federal Aviation Act provides little guidance. Plaintiffs' briefs are devoid of any reference to legislative history which would support a private right of action, and the court's own review of the relevant documents has revealed none.[16] The statute itself provides for C. A. B. enforcement of all statutory provisions and regulations and private enforcement of violations of Section 1371(a). 49 U. S. C. § 1487(a) (1970). This does not necessarily mean that these enforcement methods preclude private actions under other provisions.[17] However, this

15. Courts vary in their interpretation of whether all four factors must be considered in a given case. *Compare Rauch* v. *United Instruments, Inc.,* 548 F. 2d 452, 460 (3d Cir. 1976) *with People's Housing Development Corp.* v. *City of Poughkeepsie,* 425 F. Supp. 482, 490 (S. D. N. Y. 1976). The Supreme Court's application of *Cort* has likewise varied. *Compare Piper* v. *Chris-Craft Industries, Inc.,* ..... U. S. ....., 45 U. S. L. W. 4182, 4192-93 (1977) *with Santa Fe Industries, Inc.* v. *Green,* ..... U. S. ....., 45 U. S. L. W. 4317, 4321 (1977). It is apparent that the criteria established in *Cort* are flexible; the analysis of the factors is qualitative, not purely quantitative.

16. *See* S. Rep. No. 688, 87th Cong., 2d Sess. (1962) and H. R. Rep. No. 1950, 87th Cong., 2d Sess. (1962) (conference report), 1962 U. S. Code Cong. & Admin. News 1844; S. Rep. No. 1811, 85th Cong., 2d Sess. (1958), H. R. Rep. No. 2360, 85th Cong., 2d Sess. (1958), H. R. Rep. No. 2556, 85th Cong., 2d Sess. (1958) (conference report), 1958 U. S. Code Cong. & Admin. News 3741-72; S. Rep. No. 1661, 75th Cong., 3d Sess. (1938), H. R. Rep. No. 2254, 75th Cong., 3d Sess. (1938), H. R. Rep. No. 2635, 75th Cong., 3d Sess. (1938) (conference report).

17. *See J. I. Case Co.* v. *Borak,* 377 U. S. 426 (1964).

case falls within the Supreme Court's reasoning in *Amtrak, supra*:

> [W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. . . . This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius.* Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maximum would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act.

414 U. S. at 458. Congress provided a private remedy for violations of Section 1371(a), but not Section 1371(n), another provision of the same statutory section.[18] Section 1371(n) was added in 1962, and Section 1487(a) was not amended to provide for private enforcement of the new subsections of Section 1371.

The Court in *Amtrak* notes that "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." 414 U. S. at 458. As we have already stated, there is no evidence of legislative intent to support implying a private cause of action under Section 1371(n)(2). Furthermore, where Congress has provided for an elaborate system of agency enforcement of a statute, that is some indication that a parallel system of private enforcement was not

18. In *Cort* v. *Ash,* 422 U. S. at 82-83 n. 14, the Supreme Court refused to infer from the fact a private remedy was provided in one title of the act in question an intention to deny a private remedy with regard to a different title. The Court distinguished *Amtrak* on this point, noting that in *Amtrak* an express private remedy was provided in favor of certain plaintiffs concerning the particular provision at issue. The statutory provisions involved in the instant case more closely approximate those in *Amtrak*. Here we are concerned with different subsections of the same statutory section, not two entirely separate titles of the Act.

intended. *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412, 423 (1975); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U. S. 453 (1974).

We must next ascertain whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" *Cort* v. *Ash*, 422 U. S. at 78. The Court refers us to three cases for guidance, *Amtrak, supra; Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412, 423 (1975); and *Calhoon* v. *Harvey*, 379 U. S. 134 (1964). In all three cases, a private remedy was denied, with the Court concluding such remedy would be inconsistent with a statutory scheme which provided for agency enforcement. We agree with the analysis of Judge Haight in interpreting this third factor: "Where Congress vests enforcement responsibilities in the government agency with expertise in the particular area, the Court is inclined to regard agency enforcement as exclusive." *People's Housing Development Corp.* v. *City of Poughkeepsie*, 425 F. Supp. 482, 492 (S. D. N. Y. 1976).

It is this factor which most forcefully militates against implying a private right of action in favor of private plaintiffs to enforce Section 1371(n)(2) and the regulations promulgated thereunder. The C. A. B. has explicit authority to enforce the statute and regulations at issue, and to seek an injunction against any further violations. 49 U. S. C. § 1487(a)(1970). In addition, as adjunct to equitable relief, the C. A. B. may obtain an order for refunds of the plaintiffs' tour deposits. *C. A. B.* v. *Scottish-American Ass'n, Inc.*, 411 F. Supp. 883 (E. D. N. Y. 1976).

Mindful of the obligation to provide remedies necessary to effectuate the congressional purpose, *J. I. Case* v. *Borak*, 377 U. S. at 433 (1964), we must also "be wary against interpolating our notions of policy in the interstices of legislative provisions." *Piper* v. *Chris-Craft Industries*, ... U. S. ....., 45 U. S. L. W. 4182, 4188 (1977), citing Justice Frankfurter

in *Scripps-Howard Radio* v. *F. C. C.*, 316 U. S. 4, 11 (1964). Where a government agency can provide private parties with the relief necessary to effectuate the congressional purposes, where there is no express provision for a private remedy and the legislative history is bereft of any indication that such a remedy should be implied, courts should be hesitant to add to the burden of the judicial system. Particularly in a case such as this where the C. A. B. has filed an action against the defendants to enjoin further violations of the Act and recover the deposits made by the private plaintiffs, it is unnecessary to imply a private remedy to protect the interests of the plaintiff class.[19] Not only will judicial time be conserved, but the members of the protected class will be saved the legal fees inherent in prosecuting a private suit.

Under these circumstances, we find that unlike *J. I. Case* v. *Borak*, judicially creating a private right of action under these regulations is "unnecessary to ensure the fulfillment of Congress' purposes" in enacting the Federal Aviation Act. *See Piper* v. *Chris-Craft Industries*, ... U. S. ....., 45 U. S. L. W. 4182, 4193 (1977).[20] The C. A. B. has the authority to ade-

19. The C. A. B. filed an affidavit with its Reply Memorandum in *C. A. B.* v. *Tour Travel Enterprises*, ... F. Supp. ....., No. 76 C 4693 (N. D. Ill. 1977) noting the voluminous number of filings received by the agency on charter flights. This fact has little relevance in a case where the C. A. B. has taken action. Moreover, the Supreme Court has stated that practical limitations on an agency do not alone lead to the conclusion that any interested party should have a cause of action. *Piper* v. *Chris-Craft Industries, Inc.*, ... U. S. ....., 45 U. S. L. W. 4182, 4193 (1977).

20. In deciding this question, our primary focus was on Congress' purposes in enacting the particular statutory provision in question. Section 1371(n) was passed in 1962 to provide for the increased availability and regulation of supplemental air carriers (charters). *See* 1962 U. S. Code Cong. and Admin. News 1844. Reference to other sections of the Federal Aviation Act indicates a general purpose to promote "adequate, economical, and efficient service by air

(Footnote continued on next page.)

quately protect the interests of the plaintiff charter tour participants, and the agency has taken action to protect those interests in this case. Accordingly, the third factor joins the second in weighing against implying a private right of action in this case.

The final factor for review is whether "the cause of action [is] one traditionally relegated to state law, . . . so that it would be inappropriate to infer a cause of action based solely on federal law?" *Cort* v. *Ash*, 422 U. S. at 78. Where we have found an adequate federal remedy in the agency charged with enforcing the statute, it seems anomalous to inquire into the availability of state remedies. Nonetheless we stop short of the approach taken by those courts which find the fourth factor to be inapplicable.[21] There are state remedies available to the plaintiffs. Indeed, their complaints include counts based on breach of fiduciary duty under the escrow and surety agreements, fraud, conversion and breach of contract.[22] Other courts construing provisions of the Federal Aviation Act have found the existence of such remedies sufficient to warrant denial of a private right of action.[23] Thus, the fourth factor, like the

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(Footnote continued from preceding page.)
carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices," 49 U. S. C. § 1302(c) (1970), and to assure "the highest degree of safety in, and foster sound economic conditions in" air transportation. 49 U. S. C. § 1302(b) (1970).

21. *See, e.g., People's Housing Development Corp.* v. *City of Poughkeepsie*, 425 F. Supp. 482, 4901-91 (S. D. N. Y. 1976).

22. *See* Counts II and III in *Bratton* v. *Shiffrin*, No. 76 C 4282 (N. D. Ill., filed January 13, 1977); Count II in *Hemisphere Travel, Inc.* v. *First National Bank of Highland Park*, No. 76 C 4707 (N. D. Ill., filed December 23, 1976); Counts II-V in *Chapman* v. *First National Bank of Highland Park*, No. 77 C 284 (N. D. Ill., filed January 26, 1977).

23. *See, e.g., Rauch* v. *United Instruments, Inc.*, 548 F. 2d 452 (3d Cir. 1976); *Wolf* v. *Trans World Airlines*, 544 F. 2d 134 (3d Cir. 1976), *cert. denied*, ... U. S. ..... (1977); and *Polansky* v. *Trans World Airlines*, 523 F. 2d 332 (3d Cir. 1975).

second and third, fails to support plaintiffs' claim for an implied private right of action in this case.

Conclusion

The court concludes that plaintiffs do not have a private remedy in federal court. Initially, plaintiffs have not brought themselves within the explicit remedy provided private parties in 49 U. S. C. § 1487(a) of the Federal Aviation Act of 1958. Further, we hold that the C. A. B. Regulations upon which plaintiffs rely for jurisdiction, 14 C. F. R. §§ 378.16, 378.18, 378a.31 and 378a.32, and the statutory provisions under which these regulations were promulgated, in particular 49 U. S. C. § 1371(n)(2), do not confer an implied private right of action upon these plaintiffs.

Even though the individual plaintiffs are within the class for whose benefit the statute was enacted, they fail to meet the additional requirements established in *Cort* v. *Ash, supra,* to support the implication of a private right of action under Section 1371(n)(2) and the regulations promulgated thereunder.

Accordingly, we hold that plaintiffs do not have an explicit or implied private right of action under the regulations or statutory provisions involved in these cases and we dismiss the cases for failure to state a claim under Rule 12(b)(6). The plaintiffs must rely on the C. A. B. to vindicate their interests in federal court,[24] or they must resort to the remedies available to them in state court.

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24. The C. A. B.'s action in seeking relief for the private plaintiffs in this case was a fact of great importance to the court's decision. Had the agency failed to act, or to seek to remedy the losses of these private plaintiffs, the result may well have been different.

Having dismissed the federal claims, we also dismiss plaintiffs' pendent state claims for lack of subject matter jurisdiction. *United Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966).

Dated: August 11, 1977

Enter:

/s/ JOHN F. GRADY

United States District Judge

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 77-2037

EARL BRATTON, ET AL.,

vs. *Plaintiffs-Appellants,*

JOEL SHIFFRIN, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76 C-4282—John F. Grady, *Judge.*

No. 77-2023

ROGER CHAPMAN and JEANNE CHAPMAN, individually and on behalf of all others similarly situated,

vs. *Plaintiffs-Appellants,*

FIRST NATIONAL BANK OF HIGHLAND PARK, a National Banking Association,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77 C-284—John F. Grady, *Judge.*

ARGUED APRIL 19, 1978—DECIDED SEPTEMBER 18, 1978

Before SWYGERT, *Circuit Judge*, MOORE, *Senior Circuit Judge*,* and BAUER, *Circuit Judge*.

MOORE, *Circuit Judge*. This appeal presents the question whether a private cause of action exists, either express or implied, under the Federal Aviation Act (FAA), 49 U. S. C. § 1301 *et seq.*, against a bank that allegedly violated regulations of the Civil Aeronautics Board (CAB) governing charter tour deposits, and the officer of the bank who was to personally handle deposited funds. Contrary to the district court, 440 F. Supp. 1257 (N. D. Ill. 1977) (Grady, *J.*), we conclude that plaintiff-travelers, who have allegedly lost their prepayments for charter tours which, due to the insolvency of their organizer, never occurred, impliedly have a remedy for damages under section 1371(n)(2) of the FAA, 49 U. S. C. § 1371(n)(2).

I.

The two actions now before us were commenced by a group of persons[1] consisting of individual travelers (and, in *Bratton*, some retail travel agencies) who made deposits and/or prepayments to reserve places on numerous charter tours to foreign and

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* Senior Circuit Judge Leonard P. Moore of the United States Court of Appeals for the Second Circuit is sitting by designation.

1. *Bratton* v. *Shiffrin* (No. 77-2037) was commenced on November 18, 1976. On January 4, 1977, plaintiffs moved to have the matter maintained as a class action. *Chapman* v. *First National Bank of Highland Park* (No. 77-2023), commenced on January 26, 1977, was originally brought as a class action. All decisions on class status were deferred until decision of the present appellees' motion to dismiss.

A third lawsuit raising similar claims against the appellees herein was decided below along with those before us. *Hemisphere Travel, Inc. et al.* v. *First National Bank of Highland Park et al.*, No. 76 C 4707 (N. D. Ill.). Apparently there has been no appeal in that action.

domestic locations. These tours were organized and marketed by Tour Travel Enterprises, Inc. (TTE), a wholesale tour operator, through, *inter alia,* its affiliated retail travel agencies, Sunshine Travel Agency, Inc., and Sunshine Travel of Nevada, Inc., all of whom are defendants. The other defendants are Gerald Mann and Richard Tauber, owners and officers of the three travel companies. The defendant-appellees are First National Bank of Highland Park (FNB), a depository which, pursuant to CAB regulations, had agreed with TTE to hold travelers' prepayments in special escrow accounts and to act as surety for TTE tours, and Joel Shiffrin, vice-president of FNB, who personally handled the tour funds.

Charter tour operators such as TTE have been the subject of recent congressional concern. Since its enactment in 1958, the FFA (sic) was twice amended by provisions designed to afford greater protection against financially irresponsible charter organizers who too often had left travelers stranded and helpless. In 1962, Congress added section 1371(n)(2), Pub. L. No. 87-528, which, in order to effectuate its announced aim of "protect[ing] travelers", directed the CAB to promulgate regulations requiring supplemental air carriers engaged in charter tours to make appropriate security arrangements for the purposes of providing adequate compensation should the tours not proceed as scheduled.[2] Pursuant to its statutory authority, the CAB did, in fact, carry out its duties by prescribing an extensive regulatory scheme for the conduct of the charter tour industry. *See* Special Charter Regulations, 14 C. F. R. Part 378 (1977). In order to better elucidate our reasons for concluding that plaintiffs are properly before the federal courts to enforce these regulations, we set forth a summary of the rules designed by the CAB to implement Congress' directive to assure proper financial management of charter tour monies, *see* House Committee Report, H. R. 1639,

2. In 1968, section 1371(e)(6) was amended, Pub. L. No. 90-514, to permit regularly scheduled carriers to engage in charters provided they deal with wholesalers that meet CAB regulations.

1968 U. S. Code Cong. & Admin. News 3594, 3597, 30 Fed. Reg. 281, 282 (1965), the interpretation of which will be involved in the resolution of this dispute.

To qualify as a "tour operator" permitted to make charter arrangements, the CAB has required the fulfillment of certain filing prerequisites: One must file a prospectus, a surety bond, and a depository agreement executed by a federally insured bank. 14 C. F. R. §§ 378.10, 378.13 (1977). In this case, TTE "qualified" by filing the required prospectus and depository agreement between it and FNB as escrowee; TTE was permitted to file, and did file, a trust agreement, with FNB as trustee, in the amount of $200,000, in lieu of the surety bond.

The regulations also require a prescribed contract between the tour operator and the tour participants; this contract requires prepayment into an escrow account for transportation and ground accommodations, *see* 14 C. F. R. § 378.17. The tour operator must give notice to the participants of how to make checks payable to the depositary bank and how to make claims against the surety should a tour be cancelled. *See* 14 C. F. R. §§ 378.16(b)(2)(iv), 378.17(b).

The depository agreement must conform with the regulations governing their form and content. Under the agreement, which creates a contractual relationship between the bank (here FNB), the tour operator (here TTE), and an air carrier, the bank is to establish and maintain separate accounts for each tour, *see* 14 C. F. R. §§ 378.16(b)(2)(vii), 378a.31(b)(2)(vii), into which, presumably, the tour operator is to deposit prepayments. (The depository agreement between TTE and FNB is appended to Bratton's First Amended Complaint as Exhibit A). Under the same regulations, a tour participant who deals with the tour operator is to make his payment directly to the bank's escrow account; on sales made by retail travel agents, the agent may deduct his commission from the prepayment offered by the customer, and then is to remit the balance to the designated depository bank. Pursuant to 14 C. F. R. §§ 378.18 and 378a.32, the

bank is prohibited from "mak[ing] disbursements or payments from deposits except in accordance with the [other] provisions of this part". Thus, to greatly simplify matters, the bank may only pay the direct air carrier, hotels, sightseeing operators, and other surface accommodations up to a fixed percent of the total deposits received by the bank for the particular tour, and only at fixed times. *See* 14 C. F. R. §§ 378.16(b)(2), 378a.31(b)(2). Furthermore, the rules provide that, if the bank is notified of a tour cancellation, "the bank shall make applicable refunds directly to tour participants". 14 C. F. R. §§ 378.16(b)(2)(iv), 378a.31(b)(2)(iv).

In the case at bar, FNB assumed the duties not only as escrowee, but also as trustee. (The Trust Agreement between FNB and TTE is appended to Bratton's First Amended Complaint as Exhibit B). The trust, according to the bonding regulations, is to inure to the benefit of tour participants, and is to "continue in effect until completion of the tour". 14 C. F. R. §§ 378.16(b)(1), 378.a31(b)(1).

Against the backdrop of this rather complex regulatory scheme established "to protect travelers", 49 U. S. C. § 1371(n)(2), unfolds the story of the plaintiffs in this case. Although all of the Chapman and Bratton plaintiffs allegedly prepaid for TTE-organized charter tours scheduled to depart after October 15, 1976, none was successful in obtaining a refund after the tours were cancelled. Shortly before the scheduled departure dates, it became apparent to their creditors that TTE and its affiliated retail travel agencies were hopelessly insolvent, and, after an involuntary bankruptcy petition was filed, bankruptcy adjudications followed.[3] Plaintiffs allegedly requested that FNB return

3. TTE and Sunshine Travel Agency, Inc., were adjudicated bankrupts on October 19, 1976. *In re Tour Travel Enterprises, Inc.*, No. 76 B 8014 (N. D. Ill. 1976); *In re Sunshine Travel Agency, Inc.*, No. 76 B 8015 (N. D. Ill. 1976). Sunshine Travel of Nevada, Inc., was adjudicated a bankrupt on October 26, 1976. *In re Sunshine Travel of Nevada, Inc.*, No. 76 B 8075 (N. D. Ill. 1976).

the prepayments which, plaintiffs thought, would be available from the escrow accounts. FNB failed to refund any of the monies claimed by the plaintiffs; though over $740,000 was claimed by plaintiffs, the total in the escrow accounts for TTE tours is only about $391,000.[4]

These lawsuits ensued. In one cause of action, plaintiffs alleged that FNB and its officer, Shiffrin, violated the FAA and the Special Charter Regulations thereunder by having mismanaged the funds.[5] Specifically, plaintiffs allege that FNB acted out of self-interest to help TTE avoid its impending bankruptcy so that outstanding loans made by the bank to TTE would be repaid and so that the surety obligations would not be triggered. Further, plaintiffs aver that FNB made payments out of the escrow accounts pursuant to TTE's wrongful instructions, while fully cognizant that the regulations permitted only designated payments. The complaints also allege that the bank *qua* trustee violated its duties under the FAA. Finally, aside from the federal claims, plaintiffs also interposed pendent claims of fraud, breach of contract, and breach of fiduciary duty.

FNB and Shiffrin have denied, both on appeal and in their memoranda in support of their motions below, that any checks duly designated for the escrow accounts were diverted; further, they have taken the position that plaintiffs have no cause of action at all against them, asserting, in essence, that their duties ran only to TTE, with whom they contracted, and that under the

4. Soon after TTE's bankruptcy, FNB filed an action in the nature of an interpleader in an attempt to foreclose the rights to the escrow account. The Bankruptcy Court ruled that the court lacked summary jurisdiction over the escrow funds. *In re Tour Travel Enterprises, Inc.*, No. 76 B 8014 (N. D. Ill. March 17, 1977).

5. Jurisdiction was alleged under 28 U. S. C. § 1331(a) (federal question), and 28 U. S. C. § 1337, which grants jurisdiction over cases arising under statutes enacted pursuant to Congress' authority to regulate commerce, regardless of the amount in controversy. We find jurisdiction proper under § 1337 since violations of the FAA are at issue.

agreement, plaintiffs who dealt only indirectly with them may not recover directly. Since discovery was stayed pending resolution of appellees' motion to dismiss, the circumstances of the disappearance of funds are not clear. It has not been determined which plaintiffs made checks payable to the bank, and which paid travel agencies. What is clear is that the bank has woefully insufficient funds in its accounts to refund monies to the many individuals, travel agents, associations, and social clubs who claim to have prepaid for cancelled TTE tours, and that serious allegations of wrongdoing have been made.

Under the circumstances, and for the reasons that follow, we reverse the order of the district court, and we hold that plaintiffs have stated a claim for relief under the FAA.[6]

II.

Although we believe that plaintiffs are properly before the court, we agree with the district court that no *explicit* cause of action was provided by Congress to remedy violations of the nature here alleged. Plaintiffs' argument was that section 1007(a) of the FAA, 49 U. S. C. § 1487(a) (hereinafter "section 1487(a)"), could be read to provide express authorization for a remedy in their case. That section provides for injunctive relief as follows:

> "If any person violates any provision of this chapter, or any rule, regulation, requirement, or order thereunder, . . . the [CAB] . . . , or, in the case of a violation of section 1371(a) of this title, any party in interest, may apply to the district court . . . for the enforcement of such provision . . .; and such court shall have jurisdiction to enforce

6. Appellees' motion to dismiss was also predicated on the absence of an allegedly indispensable party (the trustee in bankruptcy). Appellees also claimed that these federal actions must be stayed under Fed. R. Bank. 401, 601. With the dismissal of the federal claims, the pendent claims were dismissed for lack of subject matter jurisdiction. Since we hold that the complaint should be restored, so, too, should the pendent claims.

> obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person . . . from further violation . . . and requiring their obedience. . . ."

Although plaintiffs argue that they are "parties in interest" and that their losses were caused by defendants' conduct which, allegedly, violates section 1371(a), we must disagree with their unduly strained reading of section 1487(a). Although there are many barriers to holding that an express cause of action exists under this section, the most compelling is that private persons are limited, under the section, to suits for violations of section 1371(a), which provides, in essence, that no "air carrier" may operate without CAB certification. Absent a violation of certification requirements by an "air carrier", no private enforcement is contemplated under this provision for injunctive relief.

The definition of "air carrier", it is true, includes one who undertakes "indirectly" to engage in air transportation, 49 U. S. C. § 1301(3), and has been deemed broad enough to encompass the activities of a tour operator who arranges charter flights. *See CAB* v *Carefree Travel, Inc.*, 513 F. 2d 375, 387-388 (2d Cir. 1975). However, we agree with the district court that, in this matter of statutory construction, even assuming that section 1487(a) could otherwise be deemed satisfied, a depository bank cannot be included in the definition of "air carrier".

Nonetheless, we think that plaintiffs may enforce compliance by implication under 49 U. S. C. § 1371(n)(2) [FAA § 401(n)], which provides:

> "In order to protect travelers and shippers by aircraft operated by supplemental air carriers, the Board may require any supplemental air carrier to file a performance bond or equivalent security arrangement, in such amount and upon such terms as the Board shall prescribe, to be conditioned upon such supplemental air carrier's making appropriate compensation to such travelers . . ., as prescribed by the Board, for failure on the part of such car-

rier to perform air transportation services in accordance with agreements therefor."

In reaching our conclusion that this quoted section provides a ground for private enforcement of the Special Charter Regulations, we have considered the four factors enunciated in *Cort* v. *Ash*, 422 U. S. 66 (1975), which we now discuss.

The first *Cort* "test" is whether plaintiffs belong to the class for whose "especial benefit" the statute in question was enacted. In our view, there is little doubt as to this factor. The statute itself was enacted "to protect travelers". Further, it was designed to protect against a specific wrong—the inability to obtain compensation when tour plans collapse. To meet the stated objective, Congress saw fit to empower the CAB to require supplemental air carriers (and "indirect" supplemental carriers) to provide adequate security arrangements so that travelers would receive their just compensation should a financially irresponsible carrier fail to perform agreed upon services. We think it safe to say that the plaintiffs are clearly within the protected class that section 1371(n)(2) was specifically designed to deal with.[7] Insofar as the plaintiff travel agencies are not, as the district court stated, "members of the traveling public", their status as

7. The Special Charter regulations of the CAB make clear the extent to which plaintiffs are members of this new federally protected class. Those regulations were proposed "to insure the financial responsibility of the tour operator to the traveling public", Notice of Proposed Rule Making, 30 Fed. Reg. 281, 282 (1965), and "to provide better protection to the public from defalcations by tour operators or breach of the contract between the tour operator and the tour participant". Modification of Surety Bond Requirements for Tour Operators, 36 Fed. Reg. 6586 (1971).

Given the regulatory scheme, under which supposedly responsible institutions such as FNB were invited to agree to safeguard any funds that may be owing upon a tour operator's inability to perform, it becomes clear that plaintiffs' travails with the bank are exactly those as to which the federal scheme was to afford protection. *See also* H. R. Rep. No. 1950, 87th Cong., 2d Sess. (1962), *reprinted in* 1962 U. S. Code Cong. & Admin. News 1844, 1866-67.

proper plaintiffs derives from their having made good their customers' losses. Hence, those agencies which have done so should be permitted to take over the claims of their customers as subrogees.

Despite Congress' clear intention to provide protection to plaintiffs in this case, appellees argue that, regardless of whether or not plaintiffs are members of a protected class under the statute, the provision only relates to "supplemental air carriers", and since none of the appellees has such status (even if other defendants fit the definition), this suit is improper. We are not dealing here, however, with a question of construction of expressly granted remedial provisions, as above, but are rather attempting to discern the parties bound by the statutorily authorized regulations at issue. It is clear from a reading of both the statute and the Special Charter Regulations that the use of a depository bank, such as FNB, was a contemplated and necessary element in effectuating the stated purpose of providing for proper security under strict controls. If implication of a cause of action is otherwise appropriate, FNB cannot escape its federally enforceable duties on the ground that it was not specially mentioned in the statute which enabled the CAB to regulate as it did. Because Congress envisioned that plaintiffs were to be protected from air travel abuses by means of the bank's adherence to federal requirements, we think that *Cort's* first test is met.

The second factor in *Cort* is whether there is any indication of legislative intent, explicit or implicit, either to create a private remedy or to deny one. Not surprisingly, neither section 1371(n)(2) nor its legislative history reveals congressional intent. On this basis, appellees argued below, and the district court agreed, that since section 1487(a) of the FAA explicitly provides for agency (CAB) enforcement of all provisions of the FAA, and since it also provides for limited private enforcement of one provision of the Act (*i.e.*, enforcement of § 1371(a) by "parties in interest"), an inference arises that those expressly

created remedies exclude all others, especially since no clear contrary evidence of legislative intent can be shown. This line of reasoning reflects the familiar maxim of *expressio unius est exclusio alterius,* which has recently been applied by the Supreme Court in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers (Amtrak),* 414 U. S. 453 (1974), and *SIPC* v. *Barbour,* 421 U. S. 412 (1975). Though the argument has some force in relation to this case, we do not believe it determinative. While we are aware that the doctrine was applied by the Supreme Court to deny the implication of a remedy in the cases it decided, we are mindful, too, of the Court's admonition that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose". *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 433 (1964). We do not believe that the intervening cases since *Borak* in any way detract from the validity of that admonition; indeed, as recently as *Cort,* 422 U. S. at 84, we were reminded that effectuation of the congressional purpose is paramount. In this case, we think that Congress' recent concern with the plight of uncompensated travelers, which resulted in two enactments that postdated the enactment of section 1487(a), the general remedial provision, indicates that if Congress did not expressly consider the issue of private enforcement of the Charter Regulations, nor did it intend to deny a remedy. The application of *expressio unius* in this context would serve only to frustrate the goal of assuring adequate security for travelers' compensation.

In any case such as this, where there is no indication of congressional intent to create or deny a private remedy, and where there *is,* under the statute in question, provision for agency enforcement, the extent of the agency's enforcement powers must be carefully considered before deciding whether *expressio unius* is to apply, and whether the implication of a private remedy would be "consistent" with the underlying purposes of the statute in dispute, which is the third *Cort* factor to be con-

sidered. The two "tests"—the second and third *Cort* factors—interrelate in a case such as this. We think that the district judge relied unduly on the theoretical availability of CAB enforcement powers when he determined that the availability of such powers militated against plaintiffs' position. We are dealing here with the enforcement of only one small part of the FAA which, though small, has spawned a vast regulatory scheme, the single goal of which is to assure relief to a traveler whose travel plans are thwarted.

Although the CAB may enforce the regulations by suing to enjoin violations, the agency has admitted that it cannot single-handedly police the administration of the Special Charter Regulations to prevent violations from occurring.[8] We recognize, as did the district court, that practical limitations on agency capabilities do not alone lead to the conclusion that any interested party should have a private remedy to enforce those matters within the agency's purview. *See Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 41 (1977). However, in a case such as this, where practical limitations are combined with a clear possibility that agency action may never be adequate to remedy the precise

8. The CAB commenced its own action under section 1487(a) of the FAA in November 1976, against Mann, Tauber, FNB, and Shiffrin. *CAB* v. *TTE*, 440 F. Supp. 1265 (N. D. Ill. 1977) (No. 76 C 4693). The CAB alleged that these defendants violated the regulations, and the complaint asked that they be restrained. The court was also asked to appoint a trustee to act on behalf of the tour participants to prosecute claims and to collect and distribute any monies due to TTE's prospective travelers.

In a Memorandum of Law addressed to the court, the CAB confessed that the finding and proving of violations of its regulations on the basis of the voluminous charter filings it received would require full-scale investigation and numerous field audits—an operation it was ill-equipped to handle. Even if it were to discover violations, "[i]t is axiomatic that such efforts are frequently, as here, too late for a simple injunction to foreclose harm; they [investigations and audits] are expensive; and they are also necessarily selective". *Bratton* and *Chapman* Joint Appendix at 50, Memorandum of CAB.

wrong which Congress sought to prevent, we think that a federal court must be willing to permit private remedial measures to better effectuate compliance with federal goals. The district court realized, in the case at bar, that CAB action would undoubtedly come too late to *prevent* travelers from sustaining losses due to violation of the Charter Regulations; however, Judge Grady relied on the supposed fact that, even if loss may not be prevented, once it is suffered, the CAB, though lacking the power to itself order refunds, may sue to obtain an order for the refund of tour deposits by means of the appointment of a trustee. The one case cited for this proposition was the district court decision in *CAB* v. *Scottish-American Association, Inc.*, 411 F. Supp. 883, 888 (E. D. N. Y. 1976). With all due respect, we think that some question may still exist as to the CAB's authority under section 1487(a) to obtain refunds for travelers. Though the *Scottish-American* decision, resting on equitable principles, has force, there is authority, perhaps overlooked below, to the contrary. *See Fitzgerald* v. *Pan American World Airways,* 229 F. 2d 499, 502 (2d Cir. 1956); *Wills* v. *Trans World Airlines, Inc.*, 200 F. Supp. 360, 364 (S. D. Cal. 1961). We believe that an issue may still exist as to the scope of the CAB's enforcement powers under the FAA in a context such as this. We do not, of course, decide the issue, but point it out merely to indicate our concern that private enforcement of the right to a refund is certainly consistent with the goal of the legislation—to protect travelers—and is, indeed, critical in a case where agency enforcement may be inadequate, if not tardy.

This is not a case where agency expertise is needed for the resolution of the dispute. Nor is this a case, like *Cort* itself, where the plaintiffs sought to enforce but a secondary "goal" of the statute in question, if a goal at all. (There, the primary goal was to insure against election abuse by curbing the undue influence that could be exerted by large corporate expenditures; plaintiffs sought a remedy to make the corporation "whole",

which, as the Court noted, would not aid in the enforcement of the primary goal of the criminal statute there in issue). Here, plaintiffs seek a remedy for the very wrong the statute was designed to prevent, by the very means contemplated to protect them.

Although this factor is not controlling, we would note that other courts have not hesitated to imply private remedies under the FAA when deemed necessary to effectuate its purpose.[9] Under the circumstances at bar, we believe a private remedy is also necessary. Defendant-appellees in this case have, in essence, denied all liability to many of the plaintiffs (*i.e.*, those who did not directly make checks payable to the bank, but who dealt through travel agencies). They have set up "defenses", by way of appellate argument, which suggest that some conflict in the regulations will have to be reconciled, and the bank's duties

9. Private rights of action have been implied under the FAA in a variety of contexts. *See, e.g., Nader* v. *Allegheny Airlines, Inc.*, 512 F. 2d 527 (D. C. Cir. 1975), *rev'd on other grounds*, 426 U. S. 290 (1976) ("bumping" of passenger; action available under FAA § 404(b), 49 U. S. C. § 1374(b)); *Fitzgerald* v. *Pan American World Airways*, 229 F. 2d 499 (2d Cir. 1956) (refusal to transport because of race); *Aircraft Owners & Pilots Ass'n* v. *Port Authority of New York*, 305 F. Supp. 93, 103-04 (E. D. N. Y. 1969) (section 308(a), 49 U. S. C. § 1349(a), provides action insofar as it assures equal access to airports); *Mortimer* v. *Delta Airlines*, 308 F. Supp. 276 (N. D. Ill. 1969) ("bumping"); *Town of East Haven* v. *Eastern Airlines, Inc.*, 282 F. Supp. 507 (D. Conn. 1968) (action available to enforce operating and landing regulations to prevent undue noise pollution).

We are aware, of course, that private rights of action have been denied under other sections of the FAA, in other contexts. However, we do not believe, as appellees suggest, that implied actions must be limited to two areas of supposed "compelling national interest", *i.e.*, discrimination or "bumping" cases, and cases involving safety regulations. Rather, it is the court's function to imply a remedy under any Act of Congress when one is necessary to effectuate the purposes of the Act in question. Each case must be decided on its own merits. We think that a remedy is entirely appropriate in this case.

to the travelers explicated. The very fact that the regulations will require interpretation is a factor which militates in favor of upholding plaintiffs' right to sue in federal court—and is the fourth *Cort* factor to be considered.

This final factor requires a determination of whether the matter before the court is one traditionally relegated to state law so that it would constitute inappropriate interference to imply federal power in the area. The district court was satisfied that plaintiffs had available to them state remedies since they had interposed claims sounding in fraud, breach of contract, conversion, and breach of fiduciary duty. We do not agree, however, that the availability of these state causes of action should, or can, preclude a federal remedy under the circumstances.

At issue here is the bank's alleged willful violation of fiduciary obligations specifically imposed by its voluntary agreement to adhere to federal regulations. State courts attempting to define the duties arising in this case will necessarily have to refer to the federal regulations subsumed in the agreements between the principals. It would be highly undesirable and inappropriate for the federal court to permit inconsistent interpretations of the provisions by relegating plaintiffs to the courts of the various states, the rules of which, perhaps, could even be applied to defeat congressional goals. We believe that uniformity is required in this area which, as can be seen from the brief description of the regulatory scheme given above, is quite complex. If the duty of the depository bank is governed—indeed, created—by federal law, then the interpretation of the law creating the duty should surely be undertaken by the federal courts. FNB's "defenses", which perhaps would be availing absent the federal regulations by which it agreed to be bound, must be determined in accordance with those regulations, not state law. Thus, this factor in the *Cort* test also militates in favor of providing a federal forum.

In sum, we believe that plaintiffs have satisfied *Cort's* "tests" for determining whether a federally implied remedy is appro-

priate. Though, as the district court noted, *Cort's* tests were applied in that case to deny a private remedy, the factors to be considered require a qualitative analysis. Here, plaintiffs are unquestionably members of a class sought to be protected by congressional enactment, and the wrong which they suffered was the specific concern of the statute and the regulations thereunder. Where, as here, the federal right is so clearly defined, and where resolution of the dispute will depend on interpretation of the regulations in question, we will not deny a remedy.

We reverse the order dismissing the complaint. Since the federal claims are restored, the district court should also consider the pendent claims as well.

Reversed and remanded for further proceedings.

BAUER, *Circuit Judge,* dissenting. I must respectfully dissent. It seems to me that the opening of new vistas in private causes of action ought to be approached rather fearfully and with a more tender regard for the acts of Congress and the limitations of the federal bench. The four-factor test of *Cort* v. *Ash* has been rather "adjusted" to reach the conclusions the majority pronounces. The trial court concluded that the plaintiffs have failed to meet the second, third and fourth tests of *Cort*—and with that opinion I agree.

To begin with, on the question of Congressional intent, I am not at all persuaded by the majority's efforts to brush aside the "*expressio unius*" doctrine that has figured so prominently in the Supreme Court's most recent efforts to determine whether an implied right of action exists under federal statutes. In *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* the Court declared that

> "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. . . . This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius.* Since the Act creates a public cause of action for the enforcement of its provisions and a

> private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act."

414 U. S. 453, 458 (1974). Similarly, in the case at hand, Congress has provided a private remedy for violation of section 1371(a) of the FAA, but has not done so for section 1371(n). It seems quite apparent, therefore, that in this case, too, the principle of *expressio unius* "compels the conclusion that the remedies created in [§ 1371(n)] are the exclusive means to enforce the duties and obligations imposed by the Act."

While finding the argument to be of "some force," the majority nevertheless insists that *expressio unius* does not apply, apparently because a private right of action is "consistent" with the underlying purposes of the statute. In this manner, the majority incorporates elements of the third *Cort* "test" into the second, reasoning that "the two 'tests' . . . interrelate in a case such as this." Such an approach, however, misconceives the essential nature of the inquiry in deciding whether or not the *expressio unius* doctrine applies; for, as the Supreme Court has made clear,

> "[an] express statutory provision for one form of proceeding ordinarily implies that no other means of enforcement was intended by the legislature. That implication would yield, however, to *'clear contrary evidence of legislative intent,'* for which we [turn] to the legislative history and the overall structure of the . . . Act."

Securities Investor Protection Corp. v. *Barbour*, 421 U. S. 412, 419 (1974) (emphasis supplied) (citations omitted). Thus, in determining the applicability of the *expressio unius* doctrine, the central question is not whether a private right of action is "consistent" with the purposes or goals of the statute, but rather, whether the overall structure of the Act, or its legislative history, furnish "*clear evidence*" of a Congressional intent to

create a private remedy. This distinction is crucial, for, as the majority itself apparently concludes, "there is no indication" of such an intent in either the legislative history or the structure of the FAA. It follows from the majority's own conclusion, therefore, that *expressio unius* should apply and that the second of the four *Cort* tests is not met in this case.

Moreover, I cannot agree that a private right of action is even "consistent" with the structure and goals of the FAA. On this point, the majority appears to suggest that private remedial measures are necessary to further the Congressional purpose of protecting travelers from "losses due to violations of the Charter Regulations." But even if a major purpose of the Act is to protect travelers from such losses (and even if the majority is correct in claiming the the CAB *may* not be able to sue for a refund of tour deposits), it does not follow that a private remedy is consistent with the statutory scheme. In *Securities Investor Protection, supra,* the Court noted that

> "Congress' primary purpose in enacting the SIPA and creating the SIPC was, of course, the protection of investors. It does not follow, however, that an implied right of action by investors who deem themselves to be in need of the Act's protection, is either necessary to or indeed capable of furthering that purpose."

421 U. S. at 421. In this case, Congress has explicitly granted to the CAB the authority to enforce the statute and regulations at issue, and to seek an injunction against any further violations. 49 U. S. C. § 1487(a). Moreover, as was noted above, there is no extrinsic evidence that Congress contemplated the agency enforcement to be anything other than exclusive. I therefore find no basis for the majority's conclusion that a private right of action is "consistent" with the statutory scheme.

Finally, it seems to me that this cause of action is a matter "traditionally relegated to state law," and thus fails to satisfy the fourth requirement of *Cort.* The majority reaches the op-

posite conclusion on the grounds, apparently, that there is a need for "uniformity" in construing federal regulations. What the opinion fails to make clear, however, is precisely why an adjudication of the plaintiffs' common law claims of fraud, breach of contract, conversion, and breach of fiduciary duty, would "necessarily have to refer to the federal regulations subsumed in the agreements between the principals." To say that federal regulations required the bank to assume certain legal obligations to the tour operator (and hence the tour participants) is one thing. To say that the regulations defined those obligations is quite another. And for my part, I can see no reason why a determination of the plaintiffs' non-federal claims would require anything other than the application of familar principles of common law contracts and torts. I must conclude, therefore, that the fourth element of the *Cort* test, like the second and third, furnishes no support for the plaintiffs' position.

Regulatory agencies, and the rules they function under should not, it seems to me, be the launching pads for new judicial journeys that add more ballast to an already overburdened federal system of dispensing justice.

I would affirm the trial court's decision that found no private cause of action exists under the regulations in question.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 11, 1979

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LEONARD P. MOORE, SR. *Circuit Judge**
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

ROGER CHAPMAN and JEANNE CHAPMAN, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,
No. 77-2023 *vs.*
FIRST NATIONAL BANK OF HIGHLAND PARK,
Defendant-Appellee.

EARL BRATTON, ET AL.,
Plaintiffs-Appellants,
No. 77-2037 *vs.*
JOEL SHIFFRIN, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 77-C-284 and 76-C-4282

John F. Grady, Judge

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled causes by coun-

* Hon. Leonard P. Moore, Sr. Circuit Judge for the U. S. Court of Appeals for the Second Circuit, is sitting by designation.

sel for the appellees, a vote of the active members of the court was requested, and a majority of the active members of the court have voted to deny a rehearing *in banc.*** A majority of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

** Hon. Philip W. Tone and Hon. William J. Bauer, Circuit Judges voted to grant the petition for rehearing and suggestion for rehearing *in banc.*

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 77-2037

EARL BRATTON, et al., *Plaintiffs-Appellants,*

vs.

JOEL SHIFFRIN, et al., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C-4282—John F. Grady, *Judge.*

No. 77-2023

ROGER CHAPMAN and JEANNE CHAPMAN, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

vs.

FIRST NATIONAL BANK OF HIGHLAND PARK, A National Banking Association,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C-284—John F. Grady, *Judge.*

On Remand from the United States Supreme Court

DECIDED MARCH 10, 1980

Before SWYGERT, *Circuit Judge,* MOORE, *Senior Circuit Judge,** and BAUER, *Circuit Judge.*

* Senior Circuit Judge Leonard P. Moore of the United States Court of Appeals for the Second Circuit is sitting by designation.

SWYGERT, *Circuit Judge*. This case is now before the court on remand from the Supreme Court which ordered the court to further consider our earlier decision in light of *Touche Ross & Co.* v. *Redington*, 442 U. S. ....., 99 S. Ct. 2479 (1979). In our decision, reported at 585 F. 2d 223,[1] we held that charter air travelers have an implied right to sue under section 401(n)(2) of the Federal Aviation Act (Act)[2] for violations of the Civil Aeronautics Board (CAB) regulations governing charter security arrangements. Having given further consideration to both *Touche Ross* and our earlier opinion in this case, we adhere to our decision to reverse the judgment of the district court which dismissed plaintiffs' complaint for the following reasons.

In *Touche Ross* the Supreme Court construed section 17(a) of the Securities Exchange Act of 1934[3] which requires broker-dealers and others to keep and file records and reports as prescribed by the Securities & Exchange Commission (SEC). Plaintiffs, customers of an insolvent brokerage firm, by court-appointed trustee and the Securities Investor Protection Corporation sued Touche Ross & Co., the brokerage house's accountants on the ground that the brokerage house's customers did not receive the benefit of federal agency enforcement because Touche Ross's filings pursuant to section 17(a) on behalf of the firm were inaccurate. Based on the set of factors set forth in *Cort* v. *Ash*, 422 U. S. 66 (1975), the Supreme Court held that no private remedy could be inferred from section 17(a)

1. On January 11, 1979, petitions for rehearing en banc were denied by this Court and a petition for writ of certiorari followed.

2. Section 401(n)(2) of the Act authorizes the CAB to prescribe security arrangements to protect air charter travelers. 49 U. S. C. § 1371(n)(2).

3. Section 17(a) reads in pertinent part:

> every broker or dealer registered pursuant to . . . this title, shall make, keep and preserve for such periods, such accounts, correspondence . . . and other records . . .

15 U. S. C. § 78q(a).

because that section was merely a recordkeeping provision designed to assist the SEC in performing its regulatory functions and did not confer rights on private parties. In its analysis, the Supreme Court found that the statute did not purport to create a private action (99 S. Ct. at 2486), did not prohibit "certain conduct" (99 S. Ct. at 2489), did not create "federal rights in favor of private parties" (99 S. Ct. at 2489), and that there was no legislative history indicating an intent of Congress to provide a private remedy (99 S. Ct. at 2486-88).[4] For these reasons the Court held that no private remedy could be inferred.[5]

Unlike the statutory provision reviewed in *Touche Ross* this court found that section 401(n) of the Act was designed specifically to provide an enforceable remedy to individual air charter travelers against insolvent tour operators by providing compensation for their loss from a financially responsible third party. 585 F. 2d at 232. In so holding, we looked to the express

4. The Court indicated that the central inquiry in the case was the congressional intent to create a private cause of action.

> Here, the statute by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful. And the parties as well as the Court of Appeals agree that the legislative history of the 1934 Act simply does not speak to the issue of private remedies under Section 17(a). At least in such a case as this, the inquiry ends there. The question whether Congress, either expressly or by implication, intended to create a private right of action has been definitely answered in the negative.

5. Justice Brennan concurred with the majority noting that two of the four factors of *Cort* v. *Ash* were present but that no cause of action could be inferred because the plaintiff is not "one of the class for whose especial benefit the statute was enacted" and because there is no legislative history, explicit or implicit, indicating an intent to create a private remedy. (99 S. Ct. at 2491). Justice Marshall dissented, stating: "I am unwilling to assume that 'Congress simultaneously sought to protect a class and deprived [it] of the means of protection.' " (99 S. Ct. at 2491-2492).

language of section 401(n) which required supplemental air carriers[6] to post a performance bond or equivalent security arrangement "in order to protect travelers * * * by aircraft * * *."[7] against the inability to obtain compensation when tour plans collapse. As we earlier concluded, "there is little doubt" that plaintiffs belong to the class for whose benefit the statute was enacted.

With respect to the existence of legislative intent to create or deny a private remedy and whether the implication of a private remedy is consistent with the underlying purposes of the act, the second and third factors of *Cort*, this court found that in enacting section 401(n)(2) Congress intended to provide a remedy against a third party for travelers when agreements for air transportation were breached. 585 F. 2d at 229. The provision declares that the purpose of the security arrangements is to provide "appropriate compensation to such travelers and

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6. "Supplemental air carriers" are carriers which operate only charters. In 1966 the Board interpreted the 1962 legislation quoted in part in note 7, *infra*, as authorizing it to permit charters to be organized and sold by independent tour operators as well as supplemental air carriers and adopted regulations which required these independent tour operators to provide surety bonds for the performance of their agreements with charter passengers. 14 C. F. C. § 378.16, 31 Fed. Reg. at 4781.

7. As it read at the time of the relevant events of this case, § 401(n)(2) provided:

> *In order to protect travelers and shippers by aircraft* operated by supplemental air carriers, the Board may require any supplemental air carrier to file a performance bond or equivalent security arrangement, in such amount and upon such terms as the Board shall prescribe, to be conditioned upon such supplemental air carrier's making *appropriate compensation to such travelers and shippers* as prescribed by the Board, for failure on the part of such carrier to perform air transportation services in accordance with agreements therefor.

49 U. S. C. § 137(n)(2); emphasis added.

shippers." Congress had been shown the evils which had arisen in the travel agent business and the consequences of agency insolvency, namely, cancelled trips after payment had been made, the stranding of passengers in foreign countries, and the failure to supply guaranteed accommodations, and had enacted a security provision to compensate aggrieved travelers and shippers.

Although the legislative history is scarce, there is nothing in the statute that explicitly creates or denies a private remedy. From the congressional silence, however, we have read a positive implication in favor of a private cause of action. First, Mr. Halaby, the Administrator of the Federal Aviation Agency in testifying before the Senate subcommittee on the performance bond amendment to the Aviation Act stated that:

> By requiring a supplemental air carrier to furnish a performance bond, a desirable specific review of the carrier's financial responsibility will have to be made—and incidentally, outside of the government—and when the bond is issued, some recourse will have been supplied to those who are otherwise helpless.[8]

This intent to provide "some recourse to those who are otherwise helpless" through a bond provision is the indication of congressional intent which the Supreme Court found wanting in the general bookkeeping and record keeping provisions reviewed in *Touche Ross*. Second, even if there was no indication at all of congressional intent to create a private remedy that factor is not conclusive when the remedy is needed to effectuate a stated fundamental congressional purpose in enacting the

8. Senate Hearings on proposed amendments to the House Substitute Amendment to S. 1969, before the Aviation Subcommittee of the Senate Committee on Commerce, 87th Cong. 2nd Sess. 103 at 34-35 (March 5, 1962) quoted at page 9 of the CAB's amicus position statement.

Mr. Halaby's comments were not brought to our attention until the CAB filed a position statement as amicus curiae on remand from the Supreme Court.

amendatory provision, (*J. I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964), and *Santa Fe Indus., Inc.* v. *Green*, 430 U. S. 462 (1977)) and when there is no evidence that Congress intended to exclude a private remedy. *Touche Ross, supra*, 99 S. Ct. 2479 (1979); *Cannon* v. *University of Chicago*, 99 S. Ct. 1946, 1953 (1979). As the Supreme Court stated in *Cannon* (99 S. Ct. at 1956):

> We must recognize, however, that the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question. Therefore, in situations such as the present one "in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to deny such cause of action would be controlling."

Finally, this court's conclusion that the presence of an express private remedy in section 1007 did not indicate a congressional intent to exclude other private remedies is supported by the Supreme Court's reasoning in both *Cannon*[9] and *Touche Ross*. The reasoning of these two cases plainly indicates that more is required to infer that Congress did not intend to create a particular private right than one fact that elsewhere in the same statute Congress has explicitly granted a private cause of action. For example, in *Touche Ross* the Supreme Court concluded that the record keeping provision under review was not intended to create private rights when other provisions which flanked that provision contained expressly-created remedies, and when one of those provisions specifically concerned false statements in reports and was enacted contemporaneously

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9. In *Cannon* the Supreme Court stated:

> The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under separate section.

99 S. Ct. at 1965.

with the record keeping provision. 99 S. Ct. at 2487-2488. With respect to the case under review, sections 1007 and 401(n)(2) were not created contemporaneously nor did Congress refer to section 1007 when delimiting the scope of the right created in section 401(n)(2). In sum, considerations which the Supreme Court in *Touche Ross* treated as relevant in concluding that Congress did not intend to infer a private right of action do not exist in the present case.[10]

The Supreme Court in *Touche Ross* reaffirmed that the four indicia identified in *Cort* are useful guides to determining whether or not a private right of action exists. Further, the Court focused in particular on the language and legislative history of the statute in order to determine the legislative intent to create a private right of action. Although the result reached here is different from the one reached in *Touche Ross,* the analysis is consistent with that used in *Touche Ross* and *Cannon* and the result is compelled by the entirely different factual situation presented. Congress was shown the problems which had been caused by the insolvency of travel agents and enacted a provision to give rights to specific individuals. Accordingly, our decision to reverse the judgment of the district court and remand for further consideration of plaintiffs' complaint is reaffirmed. In addition, the First National Bank of Highland Park's motion to strike appellants' statement of position is denied and the CAB's motion to file an amicus brief is hereby granted.

BAUER, *Circuit Judge,* dissenting. I adhere to the view that Section 401(n)(2) of the FAA does not create a private right of action for damages arising from an alleged violation of the CAB regulations governing air charter security arrangements. *Bratton* v. *Shiffrin,* 585 F. 2d 223, 232 (7th Cir. 1978) (Bauer, J., *dissenting*). I regard the majority's conclusion to the contrary to be inconsistent with a principled application of *Cort*

10. Our earlier discussion on the fourth factor in the *Cort* test requires no further amplification at this time.

v. *Ash*, 422 U. S. 66 (1975), and its progeny, the most recent of which is *Touche Ross & Co.* v. *Redington*, 422 U. S. ....., 99 S. Ct. 2479 (1979). Nor can I agree that *Touche Ross* is factually or analytically inapposite to the case at bar. In my view, *Touche Ross* is dispositive of the issue before us and mandates affirmance of the judgment entered by the district court. I therefore respectfully dissent.

The sole inquiry presented by this appeal is whether or not the Congress intended Section 401(n)(2) of the Act to provide a private remedy for a violation of its terms and the CAB regulations promulgated thereunder. The resolution of this question is, quite simply, a matter of statutory construction, and it is axiomatic that the judicial construction of a statute begin with the language itself. As the Supreme Court stated in *Touche Ross*:

> The question of the existence of a statutory cause of action is, of course, one of statutory construction . . . SIPC's argument in favor of implication of a private right of action based on tort principles, therefore, is entirely misplaced. Brief for SIPC 22-23. As we recently have emphasized, "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon* v. *University of Chicago, supra*, ... U. S. at ....., 99 S. Ct., at 1953. Instead, our task is limited solely to determining whether Congress intended to create the private right of action asserted by SIPC and the Trustee. And as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself.

99 S. Ct. 2479, 2485 (1979) (citations omitted).

In applying this standard of analysis to the statute before us, it is necessary to examine the express language of Section 401(n)(2) of the Act. At the time pertinent to this case, the statute reads as follows:

> In order to protect travelers and shippers by aircraft operated by supplemental air carriers, the Board may

> require any supplemental air carrier to file a performance bond or equivalent security arrangement, in such amount and upon such terms as the Board shall prescribe, to be conditioned upon such supplemental air carrier's making appropriate compensation to such travelers and shippers, as prescribed by the Board, for failure on the part of such carrier to perform air transportation services in accordance with agreements therefor.

49 U. S. C. § 1371(n)(2). Thus, by its terms, Section 401(n)(2) merely provides that the CAB may require supplemental air carriers to file a performance bond in such amount and upon such terms as the Board may prescribe. It does not, by its terms, purport to create a private right of action in favor of anyone. The majority concedes, as they must, that on its face Section 401(n)(2) fails to provide an express private remedy for a violation of its terms, and is therefore constrained to finding an implied private right of action in favor of the plaintiffs.

It is true that in certain circumstances a private right of action may be implied in a statute not expressly providing one. But as the Supreme Court noted in *Touche Ross*:

> [I]n those cases finding such implied private remedies, the statute in question at least prohibited certain conduct or created federal rights in favor of private parties. *E.g.*, *Cannon* v. *University of Chicago, supra* (20 U. S. C. § 1681); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454 (1975) (42 U. S. C. § 1981); *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U. S. 6 (1971) (15 U. S. C. § 78-j(b)); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969) (42 U. S. C. § 1982); *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969) (42 U. S. C. § 1973c); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968) (42 U. S. C. § 1982); *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964) (15 U. S. C. § 78n(a))

99 S. Ct., at 2485 (citations omitted). By contrast, Section 401(n)(2) neither confers rights on private parties nor proscribes any conduct as unlawful. For these reasons, the majority's

reliance on *Cannon* and *Borak* to sustain its finding of an implied private remedy under Section 401(n)(2) is misplaced.

In this case, as in *Touche Ross* vis-a-vis § 17(a) of the Securities Exchange Act of 1934, the intent of Section 401(n)(2) of the FAA is evident from its face. Section 401(n)(2) simply requires supplemental air carriers to post a performance bond or other equivalent security arrangement in order to protect charter air travelers against the inability to obtain compensation when tour plans collapse. This section parallels the other sections of the Economic Regulations of the Act, namely to provide a measure of protection in the event of liability arising from a failure to perform the underlying contract between the charter air carrier and traveler. *See, e.g.*, 49 U. S. C. §§ 1371(a) though (n). But the language of Section 401(n)(2) does not purport to confer a private damage remedy in the event that the objective of this economic regulation is not met and the carrier becomes insolvent before other remedial action by the CAB may be taken. By its terms, Section 401(n)(2) seeks to provide protection by a security agreement independent of CAB remedial measures and, in the event of insolvency, to provide recompense to charter air travelers in a state court action on the performance bond contract. In other words, there is no basis in the language of Section 401(n)(2) for inferring that a federal civil cause of action for damages exists in favor of anyone. *Touche Ross, supra* at 2486.

The majority relies on the legislative history of Section 401(n)(2) to substantiate its conclusion that the Congress intended an implied private remedy, but the legislative history of the Act is entirely silent on whether a private right of action for damages should or should not be available under § 401(n)(2) in the circumstances of this case. *See, e.g.*, Senate Report No. 688, House Report No. 1177, Conference Report No. 1950, 87th Cong., 2d Sess., *reprinted in* [1962] U. S. CODE CONG. & AD. NEWS 1844, 1844-1872. The majority concedes that "the legislative history is scarce," *ante* at 5, but reasons that because

the statute neither explicitly creates nor denies a private remedy, it is free to infer one. Accordingly, the majority concludes that "[f]rom the congressional silence, however, we have read a positive implication in favor of a private cause of action." *Id.* It seems to me that this conclusion ought to have been reached by circumspection rather than conjecture. The Supreme Court responded to the same contention in *Touche Ross* when it stated:

> As the Court of Appeals recognized, the legislative history of the 1934 Act is entirely silent on the question whether a private right of action for damages should or should not be available under § 17(a) in the circumstances of this case. App. 198. SIPC and the Trustee nevertheless argue that because Congress did not express an intent to deny a private cause of action under § 17(a), this Court should infer one. But implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best. *See Santa Clara Pueblo* v. *Martinez,* 436 U. S. 49, 64, 98 S. Ct. 1670, 1680, 56 L. Ed. 2d 106 (1978). And where, as here, the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the legislative history that § 17(a) may give rise to suits for damages reinforces our decision not to find such a right of action implicit within the section.

99 S. Ct. at 2486-2487.

The paucity of legislative history on this question compels the conclusion that no private remedy should be implied in this case either, and it is simply a *non sequitur* to "read" a contrary conclusion from this deafening legislative silence. The sole support cited by the majority for its conclusions are the comments of Mr. Halaby. But his testimony hardly qualifies as an expression of legislative intent to create such a remedy. Mr. Halaby testified:

> By requiring a supplemental air carrier to furnish a performance bond, a desirable specific review of the carrier's financial responsibility will have to be made—and inciden-

> tally, outside of the government—and when the bond is issued, some recourse will have been supplied to those who are otherwise helpless.

Ante at 5, n. 8. Even assuming that this testimony reflects the Congressional intent underlying the enactment of Section 401(n)(2), it does not follow from a plain reading of the quoted passage that in enacting Section 401(n)(2) the Congress evinced an intent to create a private remedy for damages. On the contrary, Mr. Halaby's comments appear to reflect that the relief sought by this section would be actionable in state court on a breach of contract claim, rather than a federal statutory cause of action impliedly cognizable under Section 401(n)(2).

The majority attempts to distinguish the applicability of *Touche Ross* to this case on the basis that the Supreme Court found further justification for not implying a private right of action under § 17(a) of the Securities Exchange Act of 1934 because other sections flanking § 17(a) provided private rights of action. *Ante* at 6-7. But the Congress also provided explicit remedies for violations of the FAA which, in my view, compel the conclusion that these explicit remedies are the exclusive means of enforcement for a violation of the duties and obligations imposed by the Act.[1] *See, e.g.*, 49 U. S. C. §§ 1471, 1472,

1. Indeed, the legislative history that is available regarding Section 401(n)(2) further supports the conclusion that these express remedies are the exclusive means of enforcement under the Act. As stated in the Senate Report to S. 1969, which was ultimately enacted by the Congress:

> THE ENFORCEMENT PROBLEM
>
> One cause for apprehension as to the possible adverse impact on the scheduled industry of the supplemental carriers, which was reflected in the committee's hearings, was the difficulties which have been encountered by the Board in effectively enforcing the limitations on supplemental operations which it has imposed in past orders. There have been rather notorious

(Footnote continued on next page.)

1482, 1487. The mere fact that the Congress did not enact the remedial provisions of the FAA contemporaneously with Section 401(n)(2) nor refer to these remedial provisions when delimiting the scope of the right created in that section does not extinguish the vitality of *Touche Ross* in the context of this appeal. As stated in *Touche Ross:*

(Footnote continued from preceding page.)

examples of supplemental carriers entering into illegal combinations resulting in a de facto pooling of their operating rights to provide scheduled service of far greater frequency and regularity than had been authorized by the Board. Efforts of the Board to end such practices by cease-and-desist orders or revocations of authority have been frustrated by protracted appeals to the court during which the Board's orders have been stayed. This has permitted the continuation of palpably illegal but highly profitable operations by carriers using every conceivable means to delay the inevitable legal sanction.

Such operations have never been conducted by more than a handful of supplemental carriers. The vast number of such carriers have probably suffered more from such activities than have the scheduled carriers, for they have found it impossible to compete on a legal basis, offering a severely limited number of trips, with carriers who have illegally combined to provide daily scheduled service. Unfortunately, they have probably suffered even more from the less tangible damage done by such operations to the reputation of the supplemental industry. It is implicit in the committee's action on this bill that it regards the vast majority of supplemental air carriers as responsible, safe, and useful operators who have made and will continue to make a major contribution to the development of air transportation, and particularly to national defense. The committee is determined that the supplemental industry, as well as the scheduled industry, be more effectively protected from the depredations of illegal operators.

In recommending the means to accomplish this end the committee has accepted the recommendations of the Civil Aeronautics Board, made continually over several years, that the civil penalties now provided in the Federal Aviation Act for violations of safety and other provisions of the act be made appli-

(Footnote continued on next page.)

> Further justification for our decision not to imply the private remedy that SIPC and the Trustee seek to establish may be found in the statutory scheme of which § 17(a) is a part. First, § 17(a) is flanked by provisions of the 1934 Act that explicitly grant private cause of action. § 16(b), 15 U.S.C. § 78p(b); § 18(a), 15 U.S.C. § 78r(a). Section 9(e) of the 1934 Act also expressly provides a private right of action. 15 U.S.C. § 78i(e). See also § 20, 15 U.S.C. § 78t. Obviously, then, when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 734 (1975); see *Amtrak*, 414 U.S. at 458; *T.I.M.E., Inc.* v. *United States, supra*, at 471.

99 S. Ct., at 2487 (citations omitted).

Similarly, in this case the Congress provided express remedies for a violation of the Act. *E.g.*, 49 U. S. C. §§ 1471, 1472, 1482, 1487. If the Congress wished to provide a private remedy for damages under Section 401(n)(2), it is well aware of how it may effectuate that intent. Moreover, the import of the fact that in *Touche Ross* § 17(a) was flanked by other remedial provisions is merely that it provided a "further justification" not to imply a private remedy under § 17(a) of the Securities Exchange Act of 1934.

(Footnote continued from preceding page.)

> *cable to violation of the economic provisions under title IV and of certificates issued thereunder.* Section 901 of the act now provides a civil penalty not to exceed $1,000 for each violation and provides that in the case of a continuing violation each day shall constitute a separate offense subject to the $1,000 penalty. The committee bill would amend this section to make it applicable to the provisions of title IV and certificates issued thereunder, and would thus provide the Board with the weapon it has lacked—the ability to take the profit out of illegal operations performed over a long period of time under a judicial stay.

Senate Report No. 688, 87th Cong., 2d Sess., *reprinted in* [1962] U. S. CODE CONG. & AD. NEWS 1844, 1855-1856 (emphasis supplied).

In this case, as in *Touche Ross*, the plaintiffs contend that an analysis of the standards set forth in *Cort* v. *Ash*, 422 U. S. 66 (1975), requires a finding that Section 401(n)(2) creates an implied private right of action for damages. On remand, the majority today reaffirms its holding of an implied private cause of action as consistent with *Cort*. My dissent to the original decision of the Court adequately addresses what I regard to be the salient defects in the majority's analysis under *Cort* v. *Ash*, *supra*. *Bratton* v. *Shiffrin*, 585 F. 2d 223, 232 (7th Cir. 1978) (Bauer, J., *dissenting*). It is accordingly unnecessary to further explicate my views on this point, with the exception of one final comment. In *Touche Ross*, the Supreme Court found it unnecessary to undertake the analysis outlined in *Cort* v. *Ash*, *supra*, with respect to whether a private right of action arises under § 17(a) of the 1934 Act. In that connection, the Supreme Court stated:

> We need not reach the merits of the arguments concerning the "necessity" of implying a private remedy and the proper forum for enforcement of the rights asserted by SIPC and the Trustee, for we believe such inquiries have little relevance to the decision of this case. It is true that in *Cort* v. *Ash*, *supra*, the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose, see 422 U.S., at 78, 95 S.Ct., at 2088—are ones traditionally relied upon in determining legislative intent. Here, the statute by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful. And the parties as well as the Court of Appeals agree that the legislative history of the 1934 Act simply does not speak to the issue of private remedies under § 17(a). At least in such a case as this, the inquiry ends there: The question whether Congress, either

> expressly or by implication, intended to create a private right of action, has been definitely answered in the negative.

99 S. Ct., at 2489.

In this case, the statute by its terms grants no private rights in favor of any party, proscribes no conduct as unlawful, and the legislative history is similarly silent on the issue of the availability of private remedies under Section 401(n)(2) of the FAA. In my view, for these same reasons found dispositive in *Touche Ross,* our inquiry should also end there, and "[i]f there is to be a federal damage remedy under these circumstances, Congress must provide it." 99 S. Ct., at 2490.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 12, 1980.

Before

Hon. Thomas E. Fairchild, *Chief Judge*
Hon. Luther M. Swygert, *Circuit Judge*
Hon. Walter J. Cummings, *Circuit Judge*
Hon. Wilbur F. Pell, Jr., *Circuit Judge*
Hon. Robert A. Sprecher, *Circuit Judge*
Hon. William J. Bauer, *Circuit Judge*
Hon. Harlington Wood, Jr., *Circuit Judge*
Hon. Richard D. Cudahy, *Circuit Judge*

ROGER CHAPMAN and JEANNE CHAPMAN et al.,
Plaintiffs-Appellants,

No. 77-2023 *vs.*

FIRST NATIONAL BANK OF HIGHLAND PARK,
Defendant-Appellee.

EARL BRATTON, et al.,
Plaintiffs-Appellants,

No. 77-2037 *vs.*

JOEL SHIFFRIN, et al.,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 77-C-284 and 76-C-4282

John F. Grady
Judge

Circuit Judges Cummings, Pell, Bauer, and Wood voted to grant petition for rehearing *en banc*.

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled matters by counsel for defendants-appellees, and the response filed thereto by counsel for plaintiffs-appellants, a vote of the active members of the court was requested, and less than a majority of the active members of the court having voted to grant a rehearing *en banc*.

Accordingly, IT IS ORDERED that the aforesaid petition for rehearing be and the same is hereby DENIED.

APPENDIX D.

Statutory Appendix

FEDERAL AVIATION ACT OF 1958

49 U.S. C. 1371(a)

No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

49 U. S. C. 1371(n)(2)

In order to protect travelers and shippers by aircraft operated by supplemental air carriers, the Board may require any supplemental air carrier to file a performance bond or equivalent security arrangement, in such amount and upon such terms as the Board shall prescribe, to be conditioned upon such supplemental air carrier's making appropriate compensation to such travelers and shippers, as prescribed by the Board, for failure on the part of such carrier to perform air transportation services in accordance with agreements therefor.

49 U. S. C. 1487(a)

If any person violates any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this chapter, the Board or Administrator, as the case may be, their duly authorized agents, or, in the case of a violation of section 1514 of this title, the Attorney General, or, in the case of a violation of section 1371(a) of this title, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction

or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, condition, or limitation, and requiring their obedience thereto.

APPENDIX E.

CIVIL AERONAUTICS BOARD REGULATIONS

14 C. F. R. § 378.2 Definitions.

As used in this part unless the context otherwise requires:

(a) "Inclusive tour charter" means the charter of the entire capacity of an aircraft or of less than the entire capacity of an aircraft (provided that the remaining capacity of the aircraft is under charter by a person or persons authorized to charter aircraft under §§ 207.11(c), 208.6(c), or 212.8(b), respectively, of this chapter) by a tour operator or, with respect to tours which originate in a foreign country, by a foreign tour operator for the carriage by a direct air carrier of persons traveling in air transportation on inclusive tours.

(b) "Inclusive tour" means a roundtrip tour which combines air transportation pursuant to an inclusive tour charter and land services, and which meets all of the following requirements:

(1) A minimum of seven (7) days must elapse between departure and return;

(2) The land portion of the tour must provide overnight hotel accommodations at a minimum of three places other than the point of origin, such places to be no less than 50 air miles from each other: *Provided,* That, in the case of an "air/sea tour," overnight accommodations provided aboard a ship, while in port or at sea, may be regarded as "hotel" accommodations; *And provided further,* That, for any night on which accommodations are provided aboard a ship at sea, either the first port at which the ship stops following such night, or the last port at which the ship stops preceding such night, may be regarded as the "place" at which the overnight accommodations were provided.

(3) The tour price shall include, at a minimum, all hotel accommodations and necessary air or surface transportation between all places on the itinerary, including transportation to and from air and surface carrier terminals utilized at such places other than the point of origin;

(4) The charge to the passengers for the tour, as set forth in the tour prospectus, shall be not less than 110 percent of any available fare or fares, embodied in a tariff on file with the Board, charged by a route carrier, or combination of such carriers (including charge for stopovers) for individually ticketed service on the circle route beginning at the point of origin, to the various points where stopovers are made, and return to the point of origin: *Provided,* That the tour shall be subject to the terms and conditions which are applicable to such fare or fares, as set forth in the tariff of the route carrier or carriers. For purposes of this provision, (i) the term "route carrier" shall mean a certified route air carrier or foreign route air carrier authorized under section 401 or 402 of the Federal Aviation Act of 1958, as amended, respectively, to transport persons; and (ii) the term "available fare" includes promotional or discount fares, such as family fares, children's fares, excursion fares, fares applicable to special classes of persons, group fares, etc. Where similar promotional or discount fares are offered on both jet and propeller aircraft, the available fare shall be that charged for jet services. Where no regularly scheduled service is provided between the points involved, the available fare shall be based on the fares to the nearest point served by a route carrier: and

(5) An aircraft under charter to one tour operator or foreign tour operator may carry any number of tour groups: *Provided,* That, if more than one group is carried, the charter contract for each of the groups shall be for 40 or more seats.

(6) The tour shall be arranged and sold by a tour operator acting solely as an independent principal with respect to the air

transportation included in the inclusive tour charter and not as an agent for direct air carriers.

(c) An "inclusive tour group" means an aggregate of persons who are assembled by a tour operator or a foreign tour operator for the purpose of participation as a single unit in an inclusive tour: *Provided, however,* That nothing contained herein shall preclude a tour operator or a foreign tour operator from utilizing any unused space on an aircraft chartered by it for an inclusive tour, for the transportation, on a free or reduced-rate basis, of such tour operator's or foreign tour operator's employees, directors, and officers, and the parents and immediate families of such persons, subject to the provisions of Part 223 of this chapter.

(d) "Tour operator" means any citizen of the United States (other than a direct U. S. air carrier), authorized hereunder to engage in the formation of groups for transportation on inclusive tours.

(d-1) "Foreign tour operator" means any person who is not a U. S. citizen (other than a direct foreign air carrier):

(i) Who is engaged in the formation of groups for transportation on inclusive tours which originate in a foreign country and over whom the board by § 378.3a has declined to exercise its jurisdiction; and/or

(ii) Who is engaged in the formation of groups for transportation on inclusive tours which originate in the United States and who holds a permit issued pursuant to section 402 of the Act authorizing such transportation. "Foreign tour operator" as used in §§ 378.7, 378.10-378.14, 378.16, 378.16a, 378.17, 378.18, and 378.20 is confined to the meaning set forth in this subparagraph.

(e) "Tour participant" means a member of the inclusive tour group.

(f) [Reserved]

(g) "Tour price" means the total amount of money paid by the tour participant to the tour operator for the inclusive tour.

(h) "Direct air carrier" means (1) a route air carrier holding a certificate of public convenience and necessity issued under section 401(d)(1) of the Act; (2) a supplemental air carrier holding a certificate of public convenience and necessity issued under section 401(d)(3) of the Act to perform inclusive tour charters; (3) a foreign route air carrier holding a permit issued under section 402 of the Act authorizing it to engage in foreign air transportation on an individually ticketed or individually waybilled basis; and (4) a foreign air carrier which holds a permit issued under section 402 of the Act authorizing it to perform inclusive tour charters, but only to the extent that such tours are to be performed subject to the provisions of this regulation.

(i) "Itinerary" means all the components of a tour package, as described in the tour prospectus, including not only the points named therein but also all hotels, and other grounds accommodations and services described therein.

(j) "Citizen of the United States" means (1) an individual who is a citizen of the United States or of one of its possessions or (2) a partnership of which each member is such an individual, or (3) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions.

(Secs. 101(3), 101(33), 204(a), 401, 402, 407, and 416(a), Federal Aviation Act of 1958, as amended. 72 Stat. 737 (as amended by 75 Stat. 467, 76 Stat. 143, 82 Stat. 867, 84 Stat. 921), 743, 754, 757, 766, 771; 49 U. S. C. 1301, 1324, 1371, 1372, 1377, 1386)

[SPR-40, 35 F. R. 14613, Sept. 18, 1970, as amended by SPR-42, 36 F. R. 2505, Feb. 5, 1971; SPR-47, 36 F. R. 8726, May 12, 1971; SPR-62, 37 F. R. 22853, Oct. 26, 1972; SPR-67, 38 F. R. 7219, Mar. 19, 1973; SPR-70, 378 F. R. 19680, July 23, 1973; SPR-100, 41 FR 7744, Feb. 20, 1976; SPR-103, 41 FR 20161, May 17, 1976; SPR-108, 41 FR 35160, Aug. 20, 1976]

14 C. F. R. § 378.10 Procedure.

(a) No inclusive tour or series of tours shall be operated, nor shall any tour operator or foreign tour operator sell, or offer to sell, or solicit persons to participate in, or otherwise advertise such tour or tours, or receive any money from any prospective participant in connection therewith, until at least 15 days after he and the direct air carrier have jointly filed with the Board (Supplementary Services Division, Bureau of Operating Rights), in duplicate, a Tour Prospectus satisfying the requirements of § 378.13: *Provided, however,* That if during the 15-day period following filing hereunder the tour operator or foreign tour operator has been notified that the Board has rejected such statement for noncompliance with this part, then he shall not sell, or offer to sell, solicit, or advertise such tour or tours until he has subsequently been notified by the Board that such filing has been accepted. If a series of tours is to be performed for one tour operator or foreign tour operator pursuant to one charter contract, the Prospectus may cover the entire series, provided the elapsed time between the commencement of the first tour and the departure of the last tour shall not exceed one year.

(b) Except as specified in paragraph (c) of this section, no change in the facts reflected in a filed Prospectus shall become effective until at least 15 days after the tour operator or foreign tour operator and the direct air carrier have jointly filed with the Board (Supplementary Services Division, Bureau of Operating Rights), in duplicate, an amended Prospectus reflecting such change, unless he has been notified by the Board that such change may become effective sooner: *Provided, however,* That

if during the 15-day period following filing of an amended Prospectus hereunder, the tour operator or foreign tour operator has been notified that the Board has rejected such amended Prospectus for noncompliance with this part, then such change shall not become effective until he has subsequently been notified by the Board that such filing has been accepted: *And provided further,* That the direct air carrier need not join in the filing of an amended Prospectus which reflects only such change or changes as do not involve air transportation or services in connection therewith which are to be provided by such direct air carrier. Deviations from the Prospectus may not be made except where they are beyond the control of the carrier or the operator, and there is insufficient time to file an amended Prospectus.

(c) The 15-day waiting period specified in paragraph (b) of this section shall not apply to tour price increases, changes in hotel accommodations, sightseeing arrangements, meal plans, and the order in which cities are visited, but such changes shall be filed no later than five (5) days following such changes.

[SPR-76, 39 FR 21125, June 19, 1974, as amended by SPR-114, 41 FR 42941, Sept. 29, 1976]

14 C. F. R. § 378.13, Tour prospectus.

The prospectus shall be filed in duplicate and shall include two copies of the following: The charter contract, the contract between the tour operator or foreign tour operator and tour participants, the tour operator's or foreign tour operator's surety bond (an original bond and a copy thereof) and, where applicable, two copies of the depository agreement with a bank as provided in § 378.16(b)(2). It shall also contain the following information:

(a) Name and address of the tour operator or the foreign tour operator;

(b) The proposed date and time of each flight;

(c) Equipment to be used, including the aggregate number of each type of aircraft and capacity;

(d) The tour itinerary, including hotels (name and length of stay at each), and sightseeing or other arrangements, if any;

(e) The tour price per passenger;

(f) The number of persons expected to participate in the tour;

(g) Charter price of the aircraft;

(h) The individually ticketed air fare, computed as provided in § 378.2(b)(4), specifically identifying each fare used in the computation and each tariff citation.

(i) Samples of solicitation material proposed by the tour operator or foreign tour operator (all sales advertising and solicitation material employed by the tour operator or foreign tour operator shall state the name of the direct air carrier to be utilized).

[SPR-47, 36 F. R. 8726, May 12, 1971, as amended by SPR-62, 37 F. R. 22853, Oct. 26, 1972; SPR-70, 38 F. R. 19680, July 23, 1973]

14 C. F. R. § 378.16 Surety bond.

(a) Except as provided in paragraph (b) of this section, the tour operator or foreign tour operator shall furnish a surety bond in one of the following amounts, dependent upon the length of the tour or series of tours: (1) For a tour or series of tours of 2 weeks or less, a bond in an amount of not less than the charter price for the air transportation to be furnished in connection with such tour or series of tours; (2) for a tour or series of tours of more than 2 weeks but less than 4 weeks, a bond in an amount of not less than twice the charter price; and (3) for a tour or series of tours of 4 weeks or more, and a bond in an amount of not less than three times the charter price: *Provided, however,* That the liability of the surety to any tour participant shall not exceed the tour price.

(b) The direct air carrier and the prospective tour operator or foreign tour operator may elect, in lieu of furnishing a surety

bond as provided under paragraph (a) of this section, to comply with the requirements of paragraphs (b) (1) and (2) of this section as follows:

(1) The tour operator or foreign tour operator shall furnish a surety bond in a minimum amount of $10,000 per flight up to a maximum amount of $200,000 for a series of 20 or more flights, for the protection of the tour participants, the bond to continue in effect until completion of the tour or series of tours: *Provided, however,* That the liability of the surety to any tour participant shall not exceed the tour price.

(2) The direct air carrier and tour operator or foreign tour operator shall enter into an agreement with a designated bank, the terms of which shall provide that all deposits by tour participants paid to tour operators or foreign tour operators and their retail travel agents shall be deposited with and maintained by the bank subject to the following conditions:

(i) On sales made to tour participants by tour operators or foreign tour operators the participant shall pay by check or money order payable to the bank; on sales made to tour participants by retail travel agents, the retail travel agent may deduct his commission and remit the balance to the designated bank by check or money order: *Provided,* That the travel agent agrees in writing with the tour operator or foreign tour operator that if the tour is canceled, the travel agent shall remit to the bank the full amount of commission previously deducted or received within 10 days after receipt of the notification of cancellation of the tour;

(ii) The bank shall pay the direct air carrier the charter price for the transportation not earlier than 60 days (including day of departure) prior to the scheduled day of departure of the originating or returning flight, upon certification of the departure date

by the air carrier: *Provided,* That, in the case of a round-trip charter contract to be performed by one carrier, the total round-trip charter price shall be paid to the carrier not earlier than 60 days prior to the scheduled day of departure of the originating flight;

(iii) The bank shall reimburse the tour operator or foreign tour operator for refunds made by the latter to the tour participant upon written notification from the tour operator or foreign tour operator;

(iv) If the tour operator, foreign tour operator or the direct air carrier notifies the bank that a tour has been canceled, the bank shall make applicable refunds directly to the tour participants;

(v) After the charter price has been paid in full to the direct air carrier, the bank shall pay funds from the account directly to the hotels, sightseeing enterprises, or other persons or companies furnishing surface accommodations or services in connection with the tour or series of tours upon presentation to the bank of vendors' bills and upon certification by the tour operator or foreign tour operator of the amounts payable for such surface accommodations or services and the persons or companies to whom payment is to be made: *Provided, however,* That the total amounts paid by the bank pursuant to paragraphs (b)(2)(ii) and (v) of this section shall not exceed 80 percent of the total deposits received by the bank less any refunds made to tour participants pursuant to paragraphs (b)(2)(iii) and (iv) of this section;

(vi) As used in this section, the term "bank" includes a bank, savings and loan association, or other financial institution insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation;

(vii) The bank shall maintain a separate accounting for each tour;

(viii) Notwithstanding any provisions above, the amount of total cash deposits required to be maintained in the depository account of the bank may be reduced by one or both of the following: The amount of surety bond in the form prescribed herein in excess of the minimum bond required by paragraph (b)(1) of this section; an escrow with the designated bank of Federal, State, or municipal bonds or other securities, consisting of certificates of deposit issued by banks having a stated policy of redeeming such certificates before maturity at the request of the holder (subject only to such interest penalties or other conditions as may be required by law), or negotiable securities which are publicly traded on a securities exchange, all such securities to be made payable to the escrow account: *Provided,* That such other securities shall be substituted in an amount no greater than 80 percent of the total market value of the escrow account at the time of such substitution: *And provided, further,* That should the market value of such other securities subsequently decrease, from time to time, then additional cash or securities qualified for investment hereunder shall promptly be added to the escrow account, in an amount equal to the amount of such decreased value;

(ix) Except as provided in paragraph (b)(2)(ii), (iii), (iv), (v), and (viii) of this section, the bank shall not pay out any funds from the account prior to two banking days after completion of each tour, when the balance in the account shall be paid to the tour operator or foreign tour operator, upon certification of the completion date by the direct air carrier.

(c) The bond required under paragraphs (a) and (b) of this section shall insure the financial responsibility of the tour operator or foreign tour operator and the supplying of the transportation and all other accommodations, services, and facilities in accordance with the contract between the tour operator or foreign tour operator and the tour participants, and shall be in the form set forth as Appendix A following § 378.31.[2] Such bond shall be issued by a bonding or surety company (1) whose surety bonds are accepted by the Interstate Commerce Commission under 49 CFR 1084.6; or (2) which is listed in Best's Insurance Reports (Fire and Casualty) with a general policyholders' rating of "A" or better. The bonding or surety company shall be one legally authorized to issue bonds of that type in the State in which the tour originates. For purposes of this section, the term "State" includes any territory or possession of the United States, or the District of Columbia. The bond shall be specifically identified by the issuing surety with a company bond numbering system so that the Board may identify the bond with the specific tour or tours to which it relates: *Provided, however,* That these data may be set forth in an addendum attached to the bond which addendum must be signed by the tour operator and the surety company. It shall be effective on or before the date the Tour Prospectus is filed with the Board. If the bond does not comply with the requirements of this section, or for any reason fails to provide satisfactory or adequate protection for the public, the Board will notify the direct air carrier and the tour operator or foreign tour operator, by registered or certified mail, stating the deficiencies of the bond. Unless such deficiencies are corrected within the time set forth in such notification, the subject tour or tours shall in no event be operated.

(d) The bond required by this section shall provide that unless the tour participant files a claim with the tour operator or foreign tour operator, or, if he is unavailable, with the surety,

2. Filed as part of reissued document (SPR-40).

within sixty (60) days after termination of the tour, the surety shall be released from all liability under the bond to such tour participant. The contract between the tour operator or foreign tour operator and the tour participant shall contain notice of this provision.

[SPR-47, 36 F. R. 8726, May 12, 1971, as amended by SPR-58, 37 F. R. 16172, Aug. 11, 1972; SPR-62, 37 F. R. 22853, Oct. 26, 1972; SPR-70, 38 F. R. 19680, July 23, 1973; SPR-97, 40 F. R. 52355, Nov. 10, 1975]

Supreme Court, U. S.
FILED
SEP 5 - 1980
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-146

JOEL SHIFFRIN, ET AL., *Petitioners,*

v.

EARL BRATTON, ET AL., *Respondents.*

FIRST NATIONAL BANK OF HIGHLAND PARK,
A National Banking Association, *Petitioners,*

v.

ROGER CHAPMAN and JEANNE CHAPMAN,
Individually, and On Behalf of All Others
Similarly Situated, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH COURT

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Of Counsel:
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BEATTY, LEVIN, HOLLAND, BASOFIN & SARSANY
FOX & GROVE, Chartered

The Respondents, Earl Bratton, et al. and Roger Chapman and Jeanne Chapman, jointly, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's decision.

QUESTION PRESENTED

Whether the court of appeals on remand from this Court properly applied *Touche Ross & Co.* v. *Reddington* 442 U.S. 560 (1979), and *Cort* v. *Ash,* 422 U.S. 66 (1975), in determining that an implied private right of action exists in favor or respondents who prepaid for charter air transportation pursuant to provisions of the Federal Aviation Act and related regulations and who received neither the transportation nor a refund because of violation of the Act and its regulations.

OPINIONS BELOW

These two cases, which are the subject of the petition here, were consolidated for appeal by the Seventh Circuit. The court of appeals has written two opinions on the question presented here: the first on appeal from the district court is reported at 585 F. 2d 223 (7th Cir. 1978), reh. den. Jan. 11, 1979; the second, after this Court vacated that opinion and remanded for further consideration [443 U.S. 903 (1979)], is not yet reported. The second decision of the court of appeals in these cases was entered on March 10, 1980. Petitioners' motion for rehearing and rehearing en banc of the second decision was denied on briefs on June 12, 1980. The opinion of the district court is reported at 440 F. Supp. 1257 (N.D. Ill. 1977).

STATEMENT IN OPPOSITION

The writ should be denied because the decision below is not in conflict with any decision of this Court or any other court of appeals decision. Respondents are disappointed

travelers and travel agents who prepaid for charter tours that were cancelled when the tour operators were declared bankrupt. The petitioners were responsible for the custody and maintenance of respondents' prepayments under regulations issued by the Civil Aeronautics Board (CAB) pursuant to section 401(n)(2) of the Federal Aviation Act (FAA), 49 U.S.C. § 1371(n)(2). The regulations, called the "Special Charter Regulations," imposed stringent safeguards on the handling of tour prepayments. 14 C.F.R. Part 378; 14 C.F.R. Part 378a (1976).[1] By federal law these prepayments were to be paid to and held in an escrow account with a depository bank until either the tours were provided or cancelled, (14 C.F.R. § 378.16(b), 378a.31(b)), and in the event of cancellation the prepayments were to be refunded directly to tour participants by the petitioners. 14 C.F.R. §§ 378.16(b)(iv), and 387a.31(b)(iv).

Pursuant to the Special Charter Regulations, petitioners First National Bank of Highland Park and its vice-president Joel Shiffrin agreed, at the request of the tour operators, to be the depository of respondents' funds, undertaking to safeguard and, if necessary, to refund the prepayments. When the tour operators were found bankrupt and the tours were cancelled, the petitioners were holding insufficient funds in the depository escrow account to refund respondents' prepayments in full.

Respondents brought suit against petitioners and others for, among other things, violation of the Special Charter

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[1] The Special Charter Regulations have since been revoked and replaced by "Public Charter Regulations." 43 Fed. Reg. 36603 (August 18, 1978). The new regulations eliminate the requirement of prepayment as a condition for tour participants receiving the lower charter fares from tour operators. 43 Fed. Reg. 36604 (August 18, 1978).

Regulations, including petitioners' failure to segregate and protect respondents' prepayments. The district court in a single decision dismissed the action on the grounds that respondent tour participants had no right of action to enforce obligations under the Special Charter Regulations. *Sub nom. Chapman* v. *First Nat'l Bank,* A. 1-15, 440 F. Supp. 1257 (N.D. Ill. 1977). The Seventh Circuit reversed, *Bratton* v. *Shiffrin,* A. 16-34 585 F. 2d 223 (7th Cir. 1978). After an exhaustive analysis of the operation of the regulations, their legislative history, consideration of the CAB's ability and authority to take adequate action to remedy the precise wrong which Congress sought to prevent and the inability of other forums to provide effective relief, the court below concluded that pursuant to *Cort* and its progeny a private right of action existed in favor of the respondents. A 30-31, 585 F. 2d at 232.

Petitioners' motion for rehearing and rehearing *en banc* was denied on briefs, and a petition for Writ of Certiorari followed. On June 25, 1979 this Court summarily granted petitioners' petition for Certiorari and vacated and remanded the case for "consideration in light of *Touche Ross & Co.* v. *Reddington,* 442 U.S. 560 (1979)." 443 U.S. 903 (1979).

Having given consideration to the Court's decision in *Touche Ross,* on March 10, 1980 the Seventh Circuit in an entirely new decision again reversed in the district court and found a private right action in the statutory section. A 37. The opinion, by Judge Swygert, reviewed the legislative history of the relevant portions of the FAA, relying in part upon new materials presented by the CAB which on remand had filed a Statement of Position as Amicus Curiae in support of respondents' position. The court stated, A 43:

> Although the result reached here is different from the one reached in *Touche Ross,* the analysis is consistent with that used in *Touche Ross* and *Cannon* and the result is compelled by the entirely different factual situation presented. Congress was shown the problems which had been caused by the insolvency of travel agents and enacted a provision to give rights to specific individuals.

Plaintiffs respectfully submit that the opinion on remand of the Seventh Circuit is not in conflict with any decision of this Court, or any court of appeals. Accordingly, the petition should be denied.

REASONS FOR DENYING THE WRIT

I. The Decision of the Court of Appeals Was Faithful to and Consistent with the Decisions of This Court.

This case, in which the court of appeals followed established precedent of this Court in implying a cause of action in favor of respondents, raises no questions that merit this Court's review.

This court's decision on remand in this matter is consistent with the decisions of the Supreme Court both in *Touche Ross* v. *Reddington,* 442 U.S. 560 (1979), and *Cort* v. *Ash,* 422 U.S. 66 (1975).

In determining that respondents have a cause of action under section 401(n) of the Federal Aviation Act, the Seventh Circuit on March 10, 1980 followed *Touche Ross* and inquired into whether Congress intended to create a private cause of action by examining the language and focus of the statute, its legislative history, and its purpose. 442 U.S. at 568. As a result of this inquiry, the court determined that section 401(n) of the Federal Aviation Act "was designed specifically to provide an enforceable remedy to individual air charter travelers against insolvent tour operators by providing compensation for their loss from a financially responsible third party." A 38-39.

The Seventh Circuit looked to the express language of section 401(n), which provides for a performance bond or equivalent security arrangement "in order to protect travelers . . . by aircraft" against the specific wrong suffered by the plaintiffs: "the inability to obtain compensation when tour plans collapse." A40. From this language the court held that the stated purpose of section 401(n) of the FAA, "is to provide 'appropriate compensation to such travelers, and shippers'." A 40-41.

Further, the Seventh Circuit examined the legislative history of section 401(n) and found that "in enacting section 401(n)(2) Congress intended to provide a remedy against a third party for travelers when agreements for air transportation were breached." A 40. The panel on remand had additional historical legislative analysis provided by the Civil Aeronautics Board, which was permitted to file a position statement as amicus curiae. A 41. In that statement the CAB provided an extensive legislative history of section 401(n), demonstrating that Congress had been shown the evils which had arisen in the travel agency business and the consequences of agency insolvency, namely, cancelled trips after payment had been made, the stranding of passengers in foreign countries and the failure to supply guaranteed accommodations, and that Congress had responded by enacting a security provision to compensate aggrieved travelers and shippers. A 40-41. *See also* 108 Cong. Rec. 3707, 12284. The circuit court looked specifically to the testimony of the Administrator of the Federal Aviation Agency before the Senate Subcommittee on what became section 401(n). Senate Hearings on proposed amendments to the House Substitute Amendment to S. 1969, before the Aviation Subcommitte of the Senate Committee on Commerce, 87th Cong., 2d Sess. 103 (March 5, 1962), at 34-35. From this history of the enactment of the relevant portions of section 401(n), the circuit court found "the indication of congressional in-

tent which the Supreme Court found wanting in the general bookkeeping and record keeping provisions reviewed in *Touche Ross.*" A 41.

As they have throughout, petitioners again argue in their current petition that because of the presence of an express private remedy in another part of the Federal Aviation Act, no cause of action can be implied under any other provision. This contention was considered and rejected by the court of appeals. A 42-43. The court examined the only express private remedy found in the entire Federal Aviation Act, section 1007 (49 U.S.C. § 1487), noting that it was not created contemporaneously with section 401(n)(2) of the Federal Aviation Act nor did Congress refer to it when delimiting the scope of the right created in section 401(n)(2). Section 1007 was, in fact, adopted unchanged from the Civil Aeronautics Act of 1938. 1958 U.S. Code Cong. & Ad. News 3741, 3758. Rather than an intention to deny travelers a private remedy, section 401(n) was enacted in response to Congressional concern with the plight of uncompensated travelers. A 26, 585 F.2d at 230. In *Touche Ross,* in contrast this Court found express private rights of action in four different sections of the Act, two preceding consideration that under the two following provisions and, all of which were enacted contemporaneously. The Court therefore concluded that "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly." 442 U.S. 572. Similarly, in *Transamerica Mortgage Advisors, Inc.* v. *Lewis* 444 U.S. 11, (1979), this Court found contemporaneous enactments expressing a comprehensive legislative plan.

The reasoning below is not in conflict with the rationale of the decisions in *Securities Investor Protection Corp.* v. *Barbour,* 421 U.S. 412 (1975) ("SIPC"), and *National Railroad Passenger Corp.* v. *National Association of Rail-*

road Passengers, 414 U.S. 453 (1974) ("AMTRAK"), and in particular with the application in those cases of the doctrine of *expressio unius.* This maxim at best is merely an aid to statutory construction, and an unreliable tool with which to discern legislative intent at that. See, 77 *Harv. L. Rev.* 285, 289-91 (1963). The application of that maxim in these cases does not demand its rote application here. Its role, if any, depends on the particular statute under scrutiny.

The Seventh Circuit's conclusion that the existence of an express statutory remedy in another context was not determinative of whether other private remedies were intended to be excluded is in fact the same conclusion reached by this Court in *Cort* v. *Ash,* (422 U.S. at 82, n. 14). As this court stated in *Cannon* v. *University of Chicago,* 441 U.S. 677, 711 (1979):

> [T]he Court has generally avoided this type of "excursion into extrapolation of legislative intent," unless there is other, more convincing, evidence that Congress meant to exclude the remedy. (citation omitted.)

The Seventh Circuit thoroughly examined the language of section 401, its legislative history and its purpose and properly determined that although the statute may not have expressly provided a private cause of action, one should be implied.

* * *

The four tests set out in *Cort* were faithfully and conventionally applied by the Seventh Circuit, and although this Court has never deemed it necessary for all four factors to be present, all four, as the court of appeals found on remand, have been met in this case.

Applying the first factor of the *Cort* analysis, the Seventh Circuit found (a point not disputed by petitioners here) that the purpose of section 401(n)(2) and the Special

Charter Regulations is to protect travelers, such as respondents, from the specific injury set out in the respondents' complaint: their inability to obtain refunds of their prepayments when their charter tours were cancelled. A. 23-25, 585 F.2d at 228, 229. Thus, the respondents are members of the class for whose "especial benefit" section 401(n)(2) of the FAA was enacted.

Applying the second *Cort* factor, the Seventh Circuit thoroughly analyzed the statute, regulations and their legislative history. The court found:

> that in enacting section 401(n)(2) Congress intended to provide a remedy against a third party for travelers when agreements for air transportation were breached. 585 F.2d at 229. The provision declares that the purpose of the security arrangements is to provide "appropriate compensation to such travelers and shippers." Congress had been shown the evils which had arisen in the travel agent business and the consequences of agency insolvency, namely, cancelled trips after payment had been made, the stranding of passengers in foreign countries, and the failure to supply guaranteed accomodations, and had enacted a security provision to compensate aggrieved travelers and shippers. A 40-41.

The statutes involved in SIPC and AMTRAK provide for a clear remedy by an agency for the particular wrong. In contrast the court of appeals in this case explicitly found the CAB's enforcement authority under section 107(a), 49 U.S.C. § 1487(a), questionable and that it was admittedly unable to enforce the legislative scheme. A. 27-28, 585 F.2d at 230-231. The Seventh Circuit's conclusion that the existence of an express statutory remedy in one context was not determinative of whether other private remedies were intended to be excluded, is in fact the same conclusion reached by this Court in *Cort* v. *Ash*, 422 U.S. at 82, n. 14.

Applying the third *Cort* test, the court below considered whether the implication of a private action was consistent

with the underlying purpose of the legislative scheme in question. Having already determined that the purpose of the legislation in question was to protect travelers from economic loss, the court considered whether the CAB had the ability to enforce the regulations. The Seventh Circuit was mindful of this Court's admonition in *Cort* that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." A. 26, 585 F.2d at 230, citing *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964). Since it was clear to the Seventh Circuit in light of the CAB's explicit representations both to the district court and then as *amicus curiae* on remand that it could not as a practical matter enforce the regulations, and since it was doubtful that the CAB even had the statutory authority to recover the prepayments requested by respondents if the CAB elected to attempt enforcement, the court properly concluded that it was consistent with the underlying purpose of the legislative scheme to imply a private action in favor of respondents to recover their prepayments.

> [I]n a case such as this, where practical limitations are combined with a clear possibility that agency action may never be adequate to remedy the precise wrong which Congress sought to prevent, we think that a federal court must be willing to permit private remedial measures to better effectuate compliance with federal goals.

A. 27, 585 F.2d at 230.

Finally, the Seventh Circuit thoroughly considered the fourth *Cort* factor, determining that a federal forum was appropriate because the case is not one traditionally relegated to state law. Regulation of air travel, unlike regulation of corporations and the sale of their securities, is not an area where Congress is overlapping federal statutes upon a preexisting state scheme. Rather, since the onset of commercial aviation, pervasive federal regulation has preempted state law. *City of Burbank* v. *Lockhead Air Terminal, Inc.,* 411

U.S. 624, 633-635 (1973); *Northwest Airlines* v. *State of Minnesota*, 322 U.S. 292, 303-304 (1944) (Jackson J., concurring). Cf. *British Airways Bd.* v. *Port Auth.*, 558 F.2d 75, 84 (2d Cir. 1977); *Village of Bensenville* v. *City of Chicago*, 16 Ill. App.3d 733, 738, 306 N.E.2d 562, 566 (1973); *LaSalle National Bank* v. *County of Cook*, 34 Ill. App.3d 264, 279 340 N.E.2d 79, 90-91 (1975). The court of appeals reasoned that although respondents' causes of action were not inconsistent with common law theories of liability, essential elements of each of those theories are based on duties created by federal law, namely the Federal Aviation Act and the Special Charter Regulations. Since the petitioner's duties and possible defenses can be determined only by the Act and the regulations, the court below correctly viewed respondents' causes of action as rooted in federal law, and, recognizing the need for uniformity of interpretation of that law, properly determined that a federal forum was more appropriate for the trial of these issues. A. 29-30; 525 F.2d at 232.

II. The Court of Appeals' Decision Is Not in Conflict with Any Decision of Other Circuits or of the Seventh Circuit

Petitioners suggest that the ruling below conflicts with three Third Circuit decisions, *Polansky* v. *Trans World Airlines, Inc.*, 523 F.2d 332 (3d Cir. 1975), *Rauch* v. *United Instruments, Inc.*, 548 F.2d 452 (3d Cir. 1976), *Wolf* v. *Trans World Airlines, Inc.*, 544 F.2d 134 (3d Cir. 1976), *cert. denied*, 430 U.S. 915 (1977), each of which dealt with other sections of the Federal Aviation Act. It is true that the result in this case differs from that in *Polansky, Rauch* and *Wolf*, but difference in result alone certainly cannot be considered a "conflict." Most importantly, the substantive holdings of those cases are not inconsistent with the holding here. Each

of the above cases turned on the application of the first *Cort* test to other sections of the FAA, and in each of those cases the court denied a private remedy because it found that the plaintiffs did not suffer the type of injury the statute was intended to prevent.[2] In this case, in contrast, it is clear that the type of injury suffered by respondents was the exact injury section 401(n) were intended to prevent.

III. This Case Is Not Yet Ripe for Review in This Court.

This case has not yet proceeded as far as an answer to the complaint. All discovery was stayed at the outset of the litigation, and the case was dismissed by the district court. The court of appeals has reversed the case and remanded it to the district court. All proceedings are still stayed pending the disposition on this petition for certiorari. This proceeding below is currently interlocutory. In this posture a grant of certiorari may well be premature. See, e.g., Stern & Gressman, *Supreme Court Practice* (5th ed. 1978) at § 4.19, 300-302 and cases cited therein.

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[2] In *Polansky* the purpose of statute was to insure free access to air transportation facilities; plaintiffs who, under § 404 of the Act, 49 U.S.C. § 374(b), claimed to have been furnished inferior ground accommodations in connection with a flight, were held not to be within the class for who especial benefit the statute was enacted. In *Rauch*, plaintiffs, who claimed to have suffered economic loss due to the purchase of faulty altimeters, were not within the class of persons intended to be protected by § 601, 49 U.S.C. § 1421, and regulations, the purpose of which was to insure the physical safety of travelers. In *Wolf*, plaintiffs, who were forced to forfeit free guest accommodations because of the deceptive practices of an airline, were denied a private rights of action under § 403, 49 U.S.C. § 1373(b), because the statute at issue was designed to implement tariff regulations and not prevent the type of injury suffered by plaintiffs.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

August 31, 1980

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Supreme Court, U. S.
FILED
DEC 17 1980
MICHAEL RODAK, JR., CLERK

No. 80-146

In the Supreme Court of the United States

OCTOBER TERM, 1980

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v.

EARL BRATTON, ET AL.

FIRST NATIONAL BANK OF HIGHLAND PARK, PETITIONER

v.

ROGER CHAPMAN AND JEANNE CHAPMAN, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

I

QUESTION PRESENTED

Whether Congress intended to confer a private right of action upon individuals who have sustained injuries as a result of a violation of the regulations implementing 49 U.S.C. 1371(n)(2).[1]

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[1] In conformity with the petition, the brief in opposition and the decisions below, this brief uses the statutory and regulatory citations that were in effect when this suit was filed. 49 U.S.C. 1371(n)(2) and 14 C.F.R. 378.16 (1977). However, both the statute and its implementing regulations were amended in 1978. See 49 U.S.C. (Supp. III) 1371(q)(2); see also 14 C.F.R. 380.34 (1978).

TABLE OF CONTENTS

	Page
Statute involved	1
Statement	1
Argument	3
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Cannon v. *University of Chicago*, 441 U.S. 677 ..... 5, 6, 7

Polansky v. *Trans World Airlines, Inc.*, 523 F.2d 332 3

Rauch v. *United Instruments, Inc.*, 548 F.2d 452 3

Shiffrin v. *Bratton*, 443 U.S. 903 3

Touche Ross & Co. v. *Redington*, 442 U.S. 560 ..... 3, 5, 7

Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 5

Wolf v. *Trans World Airlines, Inc.*, 544 F.2d 134, cert. denied, 430 U.S. 915 3

Statutes and regulation:

Airline Deregulation Act of 1978, 49 U.S.C. (Supp. III) 1301 *et seq.*:

49 U.S.C. (Supp. III) 1371(q)(2) ... 1, 2, 4, 7

49 U.S.C. (Supp. III) 1551(a) 2, 4

49 U.S.C. (Supp. III) 1551(b) 2, 4

Federal Aviation Act of 1958, 49 U.S.C. 1301 *et seq.*:

49 U.S.C. 1301(3) 1

49 U.S.C. 1301(35) 1

Statutes and regulation—Continued Page

49 U.S.C. 1301(36) 1
49 U.S.C. 1371(n)(2) 1, 2, 3, 4, 5, 6, 7
49 U.S.C. 1487(a) 7
5 U.S.C. 553(e) 4
28 U.S.C. 1352 ..... 1, 4, 6
14 C.F.R. 378.16 (1977) 2

Miscellaneous:

2A J. Sutherland, *Statutes and Statutory Construction* (4th ed. C. Sands 1973).... 6
Regulation of Supplemental Air Carriers: Hearing Before the Aviation Subcomm. of the Senate Comm. on Commerce, 87th Cong., 2d Sess. (1962) 6
S. Rep. No. 95-631, 95th Cong., 2d Sess. (1978) 2

STATUTE INVOLVED

49 U.S.C. 1371(n)(2) provides:

> In order to protect travelers and shippers by aircraft operated by supplemental air carriers, the Board may require any supplemental air carrier to file a performance bond or equivalent security arrangement, in such amount and upon such terms as the Board shall prescribe, to be conditioned upon such supplemental air carrier's making appropriate compensation to such travelers and shippers, as prescribed by the Board, for failure on the part of such carrier to perform air transportation services in accordance with agreements therefor.

STATEMENT

1. In 1962, Congress enacted 49 U.S.C. 1371(n)(2) for the express purpose of "protect[ing] travelers and shippers by aircraft operated by supplemental air carriers." Supplemental air carriers include charter airlines and charter tour operators. 49 U.S.C. 1301(3), (35), (36). Section 1371(n)(2) specifically authorizes the Civil Aeronautics Board to require any such carrier "to file a performance bond or equivalent security arrangement" that will assure its customers "appropriate compensation" in the event of a failure to provide transportation in accordance with the charter agreement. At the time of this enactment, as now, the federal district courts had "original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States." 28 U.S.C. 1352.

In 1978, Congress extended the protections of the former Section 1371 (n) (2) to travelers and shippers on scheduled airlines. 49 U.S.C. (Supp. III) 1371(q)(2). Thus, Congress expanded the CAB's authority to re-

quire all certificated air carriers to post performance bonds or make equivalent security arrangements that will protect their customers from financial losses if they fail to provide expected transportation services. S. Rep. No. 95-631, 95th Cong., 2d Sess. 97 (1978). This expansion of the consumer protection provisions of Section 1371(n)(2) took place within the context of the Airline Deregulation Act of 1978, 49 U.S.C. (Supp. III) 1301 *et seq.*, a statute that provides for the complete dismantlement of the CAB by January 1, 1985. 49 U.S.C. (Supp. III) 1551(a) and (b).

2. The CAB responded to the 1962 enactment by promulgating detailed regulations. 14 C.F.R. 378.16 (1977). These regulations gave tour operators the option of posting a bond or providing a combination of a bond and an escrow account. If the tour operator chose the latter option, it was required to make arrangements with a depository bank, and the bank would have to agree to comply with the CAB's regulations governing the management of escrow accounts established for the protection of the prospective travelers.

Petitioners are the First National Bank of Highland Park and its Vice-President, Joel Shiffrin. They entered into agreements with a charter tour operator that bound them to administer escrow accounts in accordance with the CAB's regulations (Pet. App. A3-A4, A18). They also agreed to provide the tour operator with a trust agreement which the Board permitted to be used in lieu of the bond normally required by its regulations. Respondents are travelers who paid in advance for charter flights conducted by the tour operator. When the tour operator was adjudicated a bankrupt, respondents asked the bank to refund their money. The bank was unable to do so because respondents' claims total more than $740,000, and the bank has only about $391,000 in the escrow accounts

(*id.* at A21). Respondents claim that the shortfall is due to the bank's failure to comply with the CAB's regulations (*id.* at A3, A21).

3. Respondents brought suit in the United States District Court for the Northern District of Illinois. The district court dismissed the action, holding that 49 U.S.C. 1371(n)(2) does not contain an implied private right of action (Pet. App. A1–A16; 440 F. Supp. 1257). The court of appeals reversed (Pet. App. A16–A34; 585 F.2d 223). This Court granted the petition for a writ of certiorari, vacated the decision of the court of appeals and remanded the case for further consideration in light of *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979). *Shiffrin* v. *Bratton*, 443 U.S. 903 (1979). On remand, the court of appeals carefully considered its decision in light of *Touche Ross* and concluded that respondents are entitled to maintain this suit (Pet. App. A37–A52).

ARGUMENT

Further review of petitioners' claims is unwarranted because the issue presented is of limited prospective importance. In any event, the decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals.[2]

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[2] Petitioners erroneously assert (Pet. 18) that the decision below conflicts with *Wolf* v. *Trans World Airlines, Inc.*, 544 F.2d 134 (3d Cir. 1976), cert. denied, 430 U.S. 915 (1977); *Rauch* v. *United Instruments, Inc.*, 548 F.2d 452 (3d Cir. 1976); and *Polansky* v. *Trans World Airlines, Inc.*, 523 F.2d 332 (3d Cir. 1975). All of these decisions construed statutes other than 49 U.S.C. 1371(n)(2). The fact that other provisions of the Federal Aviation Act of 1958 have been found not to contain an implied private right of action sheds no light on the issue presented in the instant case and creates no conflict with the decision below.

1. The Airline Deregulation Act of 1978 will eliminate the Civil Aeronautics Board by January 1, 1985. 49 U.S.C. (Supp. III) 1551(a) and (b). Under the Act, some of the regulatory functions of the CAB will simply cease. Other functions will be transferred to different agencies.

The Act does not provide for the termination of regulatory activities under 49 U.S.C. 1371(n)(2). Indeed, Congress amended and strengthened that provision in the very course of passing the deregulation legislation. 49 U.S.C. (Supp. III) 1371(q)(2). However, the fact that the Deregulation Act does not designate an agency to administer the statute after 1985 suggests that, unless Congress acts to transfer the CAB's regulatory functions under Section 1371(n)(2) to another agency, the regulations promulgated pursuant to this statute may cease to have effect when the CAB ceases to exist. Cf. 5 U.S.C. 553(e). The precise issue raised by this case may therefore never recur.

2. This case is of limited importance for another reason. Only suits involving "equivalent security arrangements" executed under Section 1371(n)(2) are affected by the decision below. The CAB's records reflect that the great majority (three out of four) of tour operators post performance bonds. Suits on these bonds may be brought in federal court under 28 U.S.C. 1352. Hence, the court of appeals' decision is unlikely to have a substantial impact in this area.

3. In any event, the court of appeals properly applied this Court's decisions and correctly concluded that Section 1371(n)(2) contains an implied private remedy for persons harmed by a tour operator or depository bank's failure to comply with the statute and its implementing regulations. The question whether a private right of action should be implied turns on a determination of legislative intent, as evidenced by the

statutory language and other traditional indicia. See, *e.g.*, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15–16 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568, 575 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979). The plain language of Section 1371(n)(2), its legislative history and the events surrounding its passage all suggest that Congress did intend to confer a private right of action upon the respondents in this case.

a. Congress passed Section 1371(n)(2) "[i]n order to protect travelers and shippers by aircraft." 49 U.S.C. 1371(n)(2). To that end, it required the supplemental air carriers "to file a performance bond or equivalent security arrangement" that would guarantee "appropriate compensation to such travelers and shippers" in the event of a failure to provide transportation in accordance with the charter agreements. The statute was plainly designed to benefit a particular group of people—travelers and shippers—by requiring charter tour operators to obtain a surety to guarantee their performance. One of the normal legal incidents of a surety agreement is its enforcement by means of a private lawsuit. Indeed, a surety agreement that cannot be enforced in court is virtually worthless. Congress must therefore have intended that litigation to enforce the surety agreements would occur. Cf. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, 444 U.S. at 18–19.

b. The legislative history of Section 1371(n)(2) is somewhat sparse. However, the Administrator of the Federal Aviation Administration offered the following testimony in support of a bonding requirement:

> There has [*sic*] been several uphappy incidents where supplemental air carriers have not carried out their contracts of transportation with members of the public principally because of financial

> difficulties. This has resulted in great inconvenience and much irritation among the persons affected. By requiring a supplemental air carrier to furnish a performance bond, a desirable, objective review of the carrier's financial responsibility will have to be made—and incidentally outside of the Government— and *when the bond is issued some recourse will have been supplied to those who are otherwise helpless.*

Testimony of N. E. Halaby, *Regulation of Supplemental Air Carriers: Hearing Before the Aviation Subcomm. of the Senate Comm. on Commerce*, 87th Cong., 2d Sess. 34–35 (1962) (emphasis supplied). Since Mr. Halaby assisted in drafting the provision that ultimately became Section 1371(n)(2), his views as to its purposes and effects are entitled to some weight. See 2A J. Sutherland, *Statutes and Statutory Construction* 210 (4th ed. C. Sands 1973).

c. The legislative context in which Section 1371(n)(2) appears provides strong support for the decision below. When Congress enacted Section 1371(n)(2), a pre-existing statute gave the federal courts "original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States." 28 U.S.C. 1352. The question whether Section 1371(n)(2) contains an implied private right of action is therefore only significant to travelers whose tour operator has chosen to provide an "equivalent security arrangement." Those whose tour operator has chosen to post a performance bond have always been able to sue in federal court. Since Congress is presumed to know the law and since it would be irrational to provide identically situated travelers with different avenues of recourse, it follows that Congress intended that all beneficiaries of Section 1371(n)(2) would be able to sue in federal court. See *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 696–698.

In addition, as mentioned earlier, Congress strengthened and expanded Section 1371(n)(2) in the context of the Airline Deregulation Act of 1978. 49 U.S.C. (Supp. III) 1371(q)(2). If petitioners are correct that the only method of enforcing the statute and its implementing regulations is through administrative action, it made no sense for Congress to increase the statute's coverage in one section of the Deregulation Act while denying travelers their only avenue of relief by eliminating the CAB in another section of the Act.

4. Petitioners' reliance (Pet. 13–15) upon 49 U.S.C. 1487(a) and the doctrine of *expressio unius est exclusio alterius* is misplaced. This Court has recently observed that "[t]he fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section." *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 711. Section 1487(a) and Section 1371(n)(2) were not enacted contemporaneously.[3] They appear in entirely different sections of the Federal Aviation Act of 1958. They deal with entirely different concerns. Section 1487(a) entitles private litigants to sue an airline for providing transportation without a license. Section 1371(n)(2) protects travelers and shippers from losses caused by licensed but financially irresponsible charter tour operators. There is simply no reason to treat either statute as a gloss upon the other. Compare *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 571–574.

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[3] Section 1371(n)(2) was enacted in 1962; Section 1487(a) was enacted in 1938.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1980

☆U.S. GOVERNMENT PRINTING OFFICE: 1980 334513 199